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CURRENT TOPICS.

We prepared some editorial comments upon the communication on "Reporting Opinions of the Supreme Court," which appeared last week over the pseudonym of "Zeta," which were intended to be printed along with it, but were unexpectedly crowded out from the lack of space. It is sufficient for us to say now, that we can not agree with our correspondent, but must adhere to the views expressed in our issue of April, 1, (12 Cent. L. J. 289). Every court in the course of its routine business is called upon to finally adjudicate many cases which, in the nature of things, can never be of any particular service, as precedents to the profession. The reports, growing so portentously in number and volume each year, are crowded with such lumber, which were far more appropriately buried in the pigeon-hole, than perpetuated in the immortality of print. If all such cases were eliminated from our books of reports, not only would the expense of a professional library be greatly lessened, but much of the labor of the practitioner in consulting the books would be saved. The arguments, advanced by our correspondent in support of his position, we consider of no force whatever. We do not believe that the average judge is actuated in the performance of his official duty by the hope of the applause of the bar or of the public, or deterred from slighting his work by the fear of their disapprobation. A man capable of being influenced by these motives, is not fit, however able and honest in other particulars, for a judicial position. *We* have never been a judge and, therefore, can not speak *ex cathedra* on the subject; but we fancy that the members of the bench, like other persons having a steady employment, fall into a routine habit, and do their work in each case, as they come to it, without any particular thought of the view which will be taken of their labor by the bar or the public.

As to the charge made in the latter part of the communication in question, that the records of the unpublished decisions of the court of appeals abound in "bad law," and bear "the evidence of hasty conclusions," we think that our correspondent must be either mistaken or prejudiced. We have never before heard that court charged with a lack of diligence, or, for that matter, of ability and legal acumen either. The complaint most usually made against it (and one, by the way, which we do not think well founded), is that it is a sort of fifth wheel in our judicial system, and not really of any great utility. Nor can we accede to the idea of our correspondent, that the Supreme Court gives greater satisfaction than the court of appeals. We do not, however, think it fair to draw any comparison between them because of the difference in their positions as court of final resort, and intermediate appellate court, and because of the great difference in the volume of litigation before each.

Inasmuch as the communication above referred to appeared in these columns, over a pseudonym, (12 Cent. L. J. 408), lest any one should tax us with holding the views there expressed, it may be well to state our position, with regard to correspondence, once for all. We consider ourselves at liberty to print such communications from members of the profession as are appropriate and of interest to the bar, but we do not hold ourselves in any case responsible for the opinions expressed in such communications, nor do we wish to have such opinions attributed to us as ours, unless we give an express assent to them. Where a communication is published over a pseudonym, or anomymously, we hold ourselves responsible to the extent of being ready at all times to furnish to any person entitled to demand it, the name of the author who, we undertake to say, shall in every instance be a reputable member of the bar.

Rather a curious point of constitutional law has been recently determined by the Supreme Court of Texas. The controversy involved the validity of a city ordinance making it a penal offense to rent any habitation knowingly to a prostitute, without reference to the purposes for which the property was to be used. The court held such an ordinance unconstitutional and void, on the ground that

however low such women may have fallen, and however great an evil the existence of such a class in the community might be considered still they are human beings and entitled to shelter and the protection of the law, and rested its determination on the authority of Chy Lung v. Freeman, 2 Otto, 275; Hayden v. Noyes, 5 Conn. 391; Hays v. The City of Appleton, 24 Wis. 542; Barling v. West, 29 Wis. 315; Austin v. Many, 16 Pick. 121; Dunham *v.* Trustees, etc., 5 Cowen, 462; 1 Dillon's Mun. Corp. § 259; Cooley's Const. Lim. (4 Ed.) 246.

A decision of interest has been rendered by the Supreme Court of Iowa, in Dunleith, etc. Bridge Co. v. Dubuque County, on the question of just what is to be understood by the words, "the middle of the main channel of the Mississippi River," which occur in the act of Congress admitting the State to the Union, and are used to indicate its eastern boundary. Defendants urged that the deep water of the stream used in the navigation of the river was meant; while the plaintiff maintained that the words in question had been used to designate the bed of the stream over which the water flowed from bank to bank. The court took this latter view, which, indeed, is the only rational one, when we consider the shifting, changing, capricious nature of the channel of navigation in the Mississippi and other western rivers, either unknown, or known only to expert pilots who make a profession of the study of a particular river, or of a particular part of a river. "It can not be possible," say the court, "that Congress and the people of the State, in describing its boundary, used the word 'channel' to describe the sinuous, obscure and changing line of navigation, rather than the broad and distinctly defined bed of the main river. The center of this river-bed channel may be readily determined, while the center of the navigable channel often could not be with certainty. The first is a fit boundary line of a State; the second can not be."

EXECUTORS AND CONTINUING GUARANTIES.

The case of Coulthart v. Clementson[1], recently decided in the English courts, throws considerable light on the position of the executor of a guarantor where the guarantee is continuing. The cases on the subject are few and not very clear, whilst the notices in the text books are still fewer and more unsatisfactory.

To begin with, the following passage occurs under the heading "guaranty" in the second edition of Mr. Starkie's work on evidence, published in 1833. "An executor, it seems, is not liable in respect of advances made after notice of the testator's death, for the death is a revocation," and he cites as his authority Potts v. Ward[2]; Cooper v. Johnson[3]; Kinguel v. Knapman[4] and Joyner v. Vyner[5]. But when these cases are looked into, they utterly fail to support Mr. Starkie's opinion which was, however, continued in the third edition of his work[6], and copied into Smith's Mercantile Law, and from it into Williams on Executors. On the other hand, in the case of Gordon v. Calvert[7], the executor was held liable on a bond giving security for the honesty of a servant, though the executor had given notice that she would no longer be answerable. There appears, however, to be a distinction between guarantees by speciality and by simple contract, and we shall for the present confine ourselves to the latter class.

The true question in deciding what is the effect of the death of the guarantor *ipso facto* seems to be, as was pointed out by Pollock, C. B., in Bradbury v. Morgan[8]: Was the agreement a mere authority, or was it a contract? If it were the former it would be put an end to by death;[9] if the latter, it would not[10]. In Bradbury v. Morgan the guarantee was in the form of a request which gave rise to a contention on the part of the defendants

1 5. Q. B. D. 42.
2 1 Marsh, 366.
3 2 B. & A. 394.
4 Cro. Eliz. 10.
5 T. Raymond, 415.
6 Vol. 2, p. 511.
7 2 Sim. 253, affirmed, 4 Russ. 581.
8 31 L. J. Ex. 462.
9 Blades v. Free, 9 B. & C. 167.
10 Williams on Executors, 8th ed., p 1728.

who were the executors of the guarantor, that it was an authority of a purely personal character, and revoked by the death of either party. The court, however, held that it was a contract. The question came before the court of appeal in the case of Harriss v. Fawcett[11]. The claim was against the estate of a deceased guarantor on a continuing guarantee to make good to a bank money paid on account to the deceased's son, to the amount of £3,000,—the guarantee to continue in force until six months after notice to the bank of the guarantor's intention to discontinue the same. The guarantor died leaving personalty under £200, and some real estate. At his death a large sum was due to the bank, but the account was continued as before with a varying balance. On account of the death the bank asked for further security, and, in consequence of their application, a large sum was paid which considerably reduced the balance. On these facts Sir George Mellish, L. J., in giving judgment in favor of the defendant, stated it to be his opinion that the guarantee was not determined by the death of the guarantor, and suggested that had the bank been unaware of his death, it would be very hard on them to hold that the guarantee was terminated[12]. Again in Coulthart v. Clementson[13], Mr. Justice Bowen held that a guarantee securing advances was not a mere mandate or authority revoked *ipso facto* by the death of the guarantor. There is, however, the case of Jordan v. Dobbins[14], where it was held that death alone revoked a guarantee which had not been previously acted on, and this was clearly correct if, as the court there held, the guarantee was not a contract, but merely an authority to sell on the credit of the guarantor. Which it was we do not pretend to say; on the one hand, there is Bradbury v. Morgan, and on the other the opinion of Lord Romilly in Harriss v. Fawcett; and again there are the dicta of Sir George Mellish in the latter case, which, without deciding the point, go far to show that some form of notice is necessary[15]. If however we may take it that the guarantee is not revoked *ipso facto* by the death of the guarantor, in what way can it be revoked short of mutual consent?

[11] L. R. 8 Ch. App. 866.
[12] L. R. 8 Ch. App. 866, 869.
[13] 5 Q. B. D. 46.
[14] 122 Mass. 168.
[15] See also Smith's Mercantile Law, 9th Ed., p. 474.

In the first place, when after the death of the guarantor the parties deal together on the footing that the guarantee is at an end, the executor will not be liable. Sir W. James, L. J., in his judgment in the case of Harriss v. Fawcett[16], the facts of which have already been given, said: "I think that what really occurred between these parties proceeded upon the footing that in substance and in truth the guarantee was at an end. A new security was asked for, and I cannot help attaching great importance to the fact that the result of one of the applications was that a sum of £3,200 was paid into the bank, reducing the debt at that moment to £1,600." "It was considered that the guarantee was at an end, except as to any debt recoverable at the time of the death of the guarantor, and that the guarantor's death determined the guarantee." And Sir George Mellish doubted whether this would not have been a defense at law, and concurred in giving judgment for the defendant on equitable grounds.

But it would be very unwise in an executor to trust to such a defense as this; and in truth, the important question is, in what manner can he put an end to the guarantee? In many cases the guarantor expressly reserves to himself a right to determine the guarantee by notice; but this promise, unless it be expressly extended to the executor, would seem not to affect him. His power is rather derived from the rights of the guarantee, irrespective of any such proviso, and we are consequently led to inquire what those rights are. In the first place, there can be no doubt that he can revoke his guarantee before it has been in any way acted upon. This is laid down very clearly in Offord v. Davies[17]. "The promise by itself," says Erle, C. J., "creates no obligation. It is in effect conditioned to be binding if the plaintiff acts upon it, either to the benefit of the defendants or to the detriment of himself. But until the condition has been, at least in part, fulfilled, the defendants have the power of revoking it." This decision was approved in Jordan v. Dobbins[18], and agrees with Mr. Starkie's statement[19], that in an action brought on a guarantee proof of a mere offer or proposal to guarantee is not sufficient; but the plaintiff must

[16] L. R. 8 Ch. App. 866.
[17] 12 C. B. (N. S.) 757.
[18] 122 Mass. 168.
[19] 2 Starkie on Evidence, 3rd Ed., 510.

also show that he has complied with the condition of the guarantee if it be conditional. So in Oxley v. Young[20]: "The right to sue on the guarantee attached when the order was put in a train for execution, subject to its being actually executed."

Thus far we are on safe ground, and the following passage from Parsons on Contracts,[21] indicates pretty clearly the line which we have now to follow. "A promise of guaranty is always revocable at the pleasure of the guarantor by sufficient notice, unless it be made to cover some specific transaction which is not yet exhausted, or unless it be founded upon a continuing consideration, the benefit of which the guarantor can not or does not renounce." The leading case on this part of the subject is Offord v. Davies.[22] There the defendants had guaranteed for the space of twelve months payment of all bills discounted for a certain firm by the plaintiffs to the extent of £600. After the guarantee was made, and before the plaintiff had discounted the bills actually sued on, the defendants countermanded the guarantee. On these facts the court of common pleas held that the defendants had a right to revoke the promise, though certain discounts had been made and repaid, each discount being considered to be a separate transaction, creating a liability on the defendant till repaid, and after repayment, leaving the promise to have the same operation that it had before any discount was made and no more. "Whether," says Mr. Justice Bowen, "this explanation be the true one or not, it is now established by authority, that continuing guarantees," securing the repayment of money advanced, "can be withdrawn on notice during the lifetime of the guarantor, and a limitation to that effect must be read, so to speak, into the contract."[23] And this view is not altogether foreign to some of the older decisions; thus in a case at *nisi prius*, where there was a guarantee for the value of goods up to £100, Wood, B., remarked that, "after goods to that amount had been supplied and paid for, perhaps the defendant might have got rid of his liability" on subsequent supplies, "by notice;" and, in the same case, on motion to enter a nonsuit, the court seem to have thought that credit might have been recalled by the defendant.[24] There is, however, a paragraph in Mr. Story's work on the Law of Contracts,[25] which at first sight appears irreconcilable with the above decisions, but the authorities annexed to it are all cases of guarantees under seal for the good conduct of clerks or servants in an employment which, from its nature, is not separable like a series of monetary transactions; and we doubt whether it would apply to any others. And we think that, in view of the cases to which we have referred, there can be now no doubt that a guarantor can, at any time by notice, terminate a guarantee not under seal in so far as it relates to separable future transactions. Again, it seems equally clear that the rule applies to protect his estate after his death, the only question being, What notice is then requisite? In answer to this it appears that either express notice by the executor, or some form of constructive notice will effectually terminate the guarantee. In Coulthart v. Clementson, it was held that, where the executor has no option of continuing the guarantee, the notice of the death of the guarantor and of the existence of a will, is sufficient constructive notice for its determination as to future advances. And Harriss v. Fawcett[26] shows this still more plainly. There the executor was himself the guaranteed debtor, and the personal estate of the guarantor was sworn under £200, all of which was in the knowledge of the bankers.

"It appears to me," says Sir W. James, L. J., "that they, the plaintiffs, must have known it was the plain duty of the executors to have given notice," to determine the guarantee. "They must have known it was either through a breach of trust, or through inadvertence or neglect on the part of the executor, that the liability of the real estate was continued, and they advanced the moneys to him with full knowledge that the real estate belonged to the beneficiaries under the will."

Having now completed our review of the cases on this subject where the contract is by parol, there still remain those where it is

[20] 2 Hy. Bla. 613, 616.
[21] Vol. 2, p. 30.
[22] 12 C. B., N. S. 748.
[23] Coulthart v. Clementson, 5 Q. B. D. 64.
[24] Mason v. Pritchard, 2 Camp. 436; 12 East, 227; see, also, Broklebank v. Moore, 2 Starkie's Evidence, 3d ed., 510, note.
[25] § 877.
[26] L. R. 8 Ch. App. 866.

under seal. Into them, however, we do not propose to inquire, but content ourselves with the observation that we entirely concur in the remarks of Mr. Parsons in his work on the Law of Contracts;[27] and since equity is now administered by the courts of common law in England, there is probably not, in fact, much difference between the two classes of contracts, at least, in that country.

Finally we may, we think, deduce from the above cases:—That where a man, who has given a continuing guarantee, dies,

1. His executor should at once give notice to determine it, supposing that he has no authority to continue it which he desires to exercise. If he does this, the guarantee will be determined so far as relates to separable future transactions.

2. The guarantee may be determined by constructive notice, examples of which we have given.

3. The guarantee may be determined by the conduct of the parties, where such conduct raises a presumption that they considered it to be at an end.

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CATCHING BARGAINS.

Lord Selborne, in Earl of Aylesford v. Morris, (L. R. 8 Ch. 490), speaking of the sort of cases "which, according to the language of Lord Hardwicke, raise from the circumstances and conditions of the parties contracting a presumption of fraud," says: "Fraud does not here mean deceit or circumvention; it means an unconscientious use of the power arising out of these circumstances and conditions; and when the relative position of the parties is such as *prima facie* to raise this presumption, the transaction can not stand unless the person claiming the benefit of it is able to repel the presumption by contrary evidence, proving it to have been, in point of fact, fair, just and reasonable." "In ordinary cases," says Lord Hatherley, on an appeal in the well-known Irish case of O'Rorke v. Bolingbroke, L. R. 2 App. Ca. 814, "each party to a bargain must take care of his own interest, and it will not be presumed that undue advantage or contrivance has been resorted to on either side; but in the case of 'the expectant heir,' or of persons under pressure without adequate protection, and in the case of dealings with uneducated, ignorant persons, the burden of showing the fairness of the transaction is thrown on the person who seeks to obtain the benefit of the contract." Those quotations may be taken as presenting a fair general indication of the modern rule on this subject; but it appears to have been considerably developed in application by an English case decided in May, 1880, and an American case decided in March, 1880, which we shall collate.

In Neville v. Snelling, 15 Ch. D. 679; 43 L. T. N. S. 244; 49 L. J. Ch. 777, the defendant, a money lender, had induced the plaintiff, a younger son of a nobleman of high rank and great estate, while still under age, to borrow money of him on extravagantly usurious conditions, and to continue to do so shortly after he had attained his majority. The defendant made no inquiry into the plaintiff's position beyond referring to a peerage, and relied for repayment, not on any definite expectations of the plaintiff's, but on the probability that, if he should be unable to pay, his father or friends would pay in order to avert bankruptcy and exposure, or that he would himself pay if he should by any means come into any of the family property. The defendant having unconscientiously received and afterwards insisted upon the continuance of payments originally made to him by the plaintiff under a mistake, and without any obligation to do so, the plaintiff sought relief on the ground that the transactions came within the rule prohibiting catching bargains with expectant heirs. On the other hand, it was contended, on behalf of the defendant, that he had placed no reliance on any definite "expectation" of the plaintiff's, inasmuch as, although there was some remote possibility of the plaintiff coming into the property, the defendant had made no inquiry about it, and it was not on the strength of that possibility that he trusted the plaintiff. "I can, however, find no case," said Denman, J., "which decides that the interference of the court is limited to cases in which the dealing has been with expectant heirs or reversioners, or to cases in which the dealing has been one in relation to the expectancy; and I gather from the expressions used in several of the cases that, if the transactions are such as to show that the money lender has throughout been unconscientiously trading upon the weaknesses of the borrower, commencing operations with him during his minority, charging him usurious interest, and endeavoring to entangle him more and more in indebtedness, not as a fair matter of business, but looking to the chances of extorting money from others interested in the debtor, especially if there be any unfair dealing in the course of the transactions which are before the court, the court will so far restrain the transaction as to compel the money lender to be satisfied with the sums advanced and fair interest on them. The real question in every case seems to me to be the same which arose in the case of expectant heirs and reversioners, before the special doctrine in their favor was established—

[27] 6th ed., vol. 2, p. 30.

that is to say, whether the dealings have been fair, and whether undue advantage had been taken of the weaknesses or necessities of the party raising the money by the money lender. Sometimes extreme old age has been unduly taken advantage of, and the transaction set aside; sometimes great distress; sometimes infancy has been imposed upon, and transactions, though ratified after full age, have been set aside because of the original vice with which they were tainted. In every case the court has to look to all the circumstances. In some cases there may result the conclusion that there exists mere inadequacy of price, or exorbitance of interest charged, in which case the transaction will not be interfered with; but in others, taking the whole history together, it may present so many features of unconscientiousness, extortion and unfair dealing on the one side, and weakness on the other, as to compel the court to exercise its equitable jurisdiction; at all events, so far as to restrain the profits of the money lender within fair and reasonable bounds." So that it appears that the equitable relief granted from an unconscionable or catching bargain entered into with an expectant heir or reversioner may also be granted where the borrower is the son of a man of large property, but has no property of his own, or expectation, except such general expectations as are founded on his father's position in life; and that the rule in question is not restricted to the case of expectant heirs, but extends to all cases in which unconscientious and unfair advantage has been taken.

In Bogle's Estate (9 W. N. C. 256), the other case to which we have adverted, the court said: "We find Bogle, a young man between twenty-three and twenty-four years of age, having been engaged in the grocery business for two or three years, to all appearances pretty closely pressed for money, borrowing from Mr. Sticker, or his wife some $2,000, at a rate of interest of 18 per cent per annum, and applying to the same person for a new loan at like rate, this on the security of his patrimony — in the hands of his guardian, and not due for a little over a year. We find him afterward selling the claim at a discount of at least $1,000, receiving in payment the discharge of two small judgments amounting in all to $135, the balance due on a former mortgage, $200, some $357 in money, some small expenses paid, and notes at 6 and 12 months, $576.63 each, some $250 of a discount on the $500, and at least one of the notes, if not both, shaved at a discount of about 18 per cent. Mr. Bogle swears that he was to have the money when wanted. Is this such an oppressive and fraudulent advantage taken of Bogel under the circumstances, as will entitle him to relief in equity? We must premise that his guardian, who had looked after his affairs for many years, and who stood *in loco parentis*, is not made acquainted with the intended sale." "Bogle makes a sale in advance of a legacy, not due for over a year, at a very heavy discount, and all paid in notes, which it is said could be better sold at a discount than could a legacy. Is not this catching a bargain from one having an estate in expectancy? Does it not amount to a fraud in law?" "The case presents these principles in brief. A father desirous of securing an adequate maintenance for his minor son, places his patrimony in the hands of a testamentary guardian, fixing the amount to be applied to his support annually, until he should attain the age of twenty-five years, thereby pretty clearly showing that, until he attained that age he would not be capable of managing his own affairs with judgement. About eighteen months before reaching that age, a business man of mature years bargains with him for the purchase of the whole balance, at a discount in all of over 33 per cent. after learning from the guardian the precise amount which would be coming. This we consider is taking advantage of the situation of a necessitous young man in buying his expectancy, and is what the law will not tolerate. It defeats the object of the father in tying up the estate of his son in the hands of the guardian, to prevent it being squandered. It is, therefore, ordered that out of the money paid into the Orphans' Court, there be first applied the expense of the audit and other costs, and that there be next paid the amount paid by Sticker to Bogle with legal interest thereon from the time of payment until the same was deposited in the Orphans' Court, and that the case be referred back to the auditor to fix the amount due, and the residue of the fund we adjudge to Charles E. Bogle." In Neville v. Snelling (*ubi supra*), it was held that the money lender was only entitled to obtain repayment of the sum actually advanced, with 5 per cent. from the dates of such advances.—*Irish Law Times.*

EVIDENCE AS TO CHARACTER.

There are three modes in which character might possibly be put in evidence with a view to raise a presumption as to a man being innocent of a crime charged against him; first, by giving testimony as to previous acts of the accused under somewhat similar circumstances to those of the act in question; secondly, by persons who have had opportunities of forming an opinion as to the disposition of the accused, testifying the result of their experience; and, thirdly, by the testimony, not of the witness's own estimate of the accused, but of the estimate in which he is held by the community amongst whom he has lived and with whom he has mingled. The first of these modes, evidence of specific acts, has never been tolerated in our courts. Nothing could be more unfair to prisoners, according to every English idea of criminal jurisprudence, because, on the one hand, the evidence that a man had on one or two occasions not committed a felony, would go a small way to raise a presumption of innocence; and, on the other, if, as would be necessary, similar evi-

dence was to be allowed to the prosecution. proof of one or two previous transgressions would create such a violent prejudice against the prisoner, that in many cases conviction would depend much more on the nature of the antecedents of the accused, than on the proof of the commission of the crime charged. Moreover, the endeavor to substantiate or disprove the various acts alleged, would incumber the issue to be tried with such labyrinths of doubtful and collateral questions, as to insure the hopeless embarrassment of juries and endless prolongation of trials.

Endeavors have been frequent to bring to bear on the question of guilt or innocence the opinion formed by individual witnesses as to the character of the accused. Indeed, such evidence is practically often given in all courts. The questions generally asked of a witness to character are, "How long have you known the prisoner?" "What is his character?" And in reply, nine times out of ten, the witness gives the result of his own experience. Yet it is clearly settled that no such evidence can be given. "Character," said Lord Erskine in R. v. Hardy (24 St. Tr. 1079), "is the slow spreading influence of opinion arising from the deportment of a man in society; as a man's deportment, good or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion. That general opinion is allowed to be given in evidence." So in Reg. v. Turner (10 Cox C. C. 31), Lord Cockburn says, "I find it uniformly laid down in the books of authority that the evidence to character must be evidence to general character in the sense of reputation." And in Reg. v. Rowton (34 L. J. 57, M. C.), the point came expressly to be decided under the following circumstances: A schoolmaster was charged with committing an indecent assault upon one of his scholars; evidence was called to character on his behalf, and similar evidence was called against him by the prosecution in the person of a witness who had formerly attended the prisoner's school. In reply to the question as to the character of the accused the witness said: "I know nothing of the neighborhood's opinion, because I was only a boy at school when I knew him; but my own opinion, and the opinions of others who were also pupils of his, is, that his character is that of a man capable of the grossest indecency and the most flagrant immorality." Here, then, the issue between the reception of evidence of the second and third classes into which it has above been divided, was sharply raised. The witness distinctly disclaimed his ability to testify to the general estimate formed of the prisoner's character by the circle in which he moved, but volunteered the opinion which was the outcome of his own acquaintance with him. This evidence the Court for Crown Cases Reserved held, by a majority of eleven to two (Erle C. J., and Willes, J., being the dissentients), could not be received. In giving their judgments, however, the holders of the prevailing opinion emphasized the fact that they felt themselves coerced by the stream of authority, and took care to guard against any expression of approval of the rule which they enunciated; indeed, the pains taken by them to plant their decision firmly behind the entrenchment of authority without any expressions of approval, lead strongly to the inference that they saw little to admire in a rule for which they, sitting as a court of ultimate appeal, could find no foundation in reason or equity. On the other hand, the two dissentient judges adduced weighty arguments for admitting a witness's testimony as to his estimate of the character of the accused derived from experience, and felt so convinced by the cogency of those arguments, that they were prepared to do away with the rule, and allow the impeached answer. There can be little doubt that, if the matter were a *res nova*, the rule would be made in conformity with their opinion.

The evidence of reputation which consists in a witness stating not what he himself knows of the prisoner's character, but what he has heard concerning it, is an authorization in that particular instance of that kind of testimony generally most abhorrent to our rules of evidence — namely, hearsay. The witness finds out what a certain number of gossips or tattlers say, or what he thinks they said, in idle moments, and retails this to the court. This hearsay is likely to be of the most partial kind, since, if the witness has been a known friend of the prisoner, he is very unlikely to have been made the repository for sinister rumors, and, if an enemy, he has in all probability been the confidant of every calumnious and slanderous whisper; so that in a small society, much given to cliqueism, two witnesses might well be brought forward, one of whom might truly swear that he never heard anything against the accused, which in the opinion of Chief Justice Erle (10 Cox C. C. p. 33), is the best character a man can receive, and the other, with equal veracity, might swear that the reputation of the accused was very bad. It is, too, the most unsatisfactory kind of hearsay conceivable, because there is no rule as to the proportion of opinions from which general reputation is to be assumed. If the witness had heard two persons give their opinion that the accused was untrustworthy, he might swear that the prisoner bore a bad character, even though those two persons were engaged in an intent to traduce. Indeed, the cruel injustice which the rule is capable of working is, perhaps, most apparent from the consideration that it is only requisite for malice, before commencing a prosecution, to be sufficiently successful in spreading calumnies to rob its victim of the benefits he might derive from the most untarnished reputation. Again, the exclusion of direct and allowance of hearsay evidence of reputation has sometimes the effect of shutting out the most convincing support which a career of integrity can give to innocence, and possibly the still more extraordinary result of compelling a witness to depose to what he has the best reason for knowing not to

be a fact. If, for instance, a servant is indicted by a new master for dishonesty, in the absence of direct proof of guilt or innocence, the testimony of a former master that he had for many years served him with conspicuous probity would undoubtedly be the most satisfactory evidence to character producible; but the master may be quite unable to speak to general reputation, and so the servant is deprived of what would be the most conclusive testimony in his favor, for the very reason that it consists in experience and not in hearsay. On the other hand, suppose the witness to have an absolute knowledge that the prisoner has previously committed offenses similar to that charged, if the prisoner has been sufficiently adroit and hypocritical to keep up appearances among his neighbors and to hoodwink them into the belief that he is an upright man, he will receive the benefit of his duplicity, and the witness who knows to the contrary will have to deliberately deceive the court and judge, by deposing to his good character.

Surely, in the common sense conduct of affairs, there would not be a moment's hesitation whether, in investigating the character of a man, to place more dependence on a deliberate opinion formed as the result of personal contact and experience, or on a recollection of the random utterances of an indefinite number of persons who may never have seen the object of their garrulity, nor have had the remotest opportunity of forming a judgment upon his merits. The reception of such evidence would not be open to the decisive objections urged against previous acts of the accused being adduced, because the only questions admissible would be as to the means of knowledge of the witness, and the deduction he drew from those means of knowledge concerning the disposition of the accused. Here there would be occasion neither for wrangling over disputed facts, nor for the prejudice inseparable from taking for granted that a previous similar offense has been committed by the accused.

We may, perhaps, be permitted to suggest that in a careful perusal of the judgments in Reg. v. Rowton, sufficient justification might be found for inserting in the forthcoming criminal code a section devoted to the subject of evidence to character, so altering the rule relating thereto that, if such evidence is to be retained at all, we may have it for the future the best instead of the worst possible of its kind.—*Law Times.*

JUDGMENT — DEATH OF PARTY — NUNC PRO TUNC ENTRY.

MITCHELL v. OVERMAN.

Supreme Court of the United States, October Term, 1880.

Where a case has been argued and submitted, and taken under advisement by the court, "the decree to be rendered as of the term of said trial and submission," the court has the power to make such *nunc pro tunc* entry at a subsequent time, notwithstanding the fact of the death of the plaintiff in the interval, and that the suit was not revived in the name of his personal representative, to whom it survived.

In error to the Circuit Court of the United States for the Southern District of Ohio.

Mr. Justice HARLAN delivered the opinion of the Court:

On the 26th day of July, 1866, Conrad Stutzman commenced an action against Robert Mitchell and others, in the district court for the county of Webster, a court of general jurisdiction, in the State of Iowa. Two of the defendants, although duly served with process, failed to appear, and against them, a decree *pro confesso* was entered by the State court, at its October term, 1868. As to all the other parties, the plaintiff and the defendants being present in person, or by counsel, "the cause" (quoting from the record) "was submitted upon the pleadings and proofs on file; and, after argument of counsel, the cause was then finally submitted, and taken under advisement by the court, the decree herein to be rendered as of the term of said trial and submission." Thereafter, at the October term, 1870, Mitchell "asked leave to amend his answer, which was granted, at the May term, 1871, upon terms." Subsequently, at the October term, 1872, that "amendment was stricken from the files for non-compliance with such terms;" and, thereupon, the court, at the last named term, to wit, on November 10, 1872, rendered a decree in favor of Stutzman against Mitchell for the sum of $3, 395.58, with interest thereon at the rate of six per cent. per annum, from October 16, 1868, and for the costs. It was further ordered that the decree be "entered now [then], as of the 16th day of October, 1868, the last day of the October term of this court, 1868, and shall take effect as of that date."

It appears that while the case was held under advisement, to wit, on the 10th of November, 1869, Stutzman, the sole plaintiff, died intestate. No suggestion, or notice of his death, was ever made of record, nor was the suit revived in the name of his personal representative, to whom, under the laws of Iowa, the right of action survived. Indeed, administration upon his estate was not had until November 26, 1872.

At the time the decree was rendered, neither Mitchell nor his attorney had any knowledge of Stutzman's death, but that fact was known to

Stutzman's attorney of record, who drafted and procured the entry of the decree. It is, however, found by the court below, to which the cause was submitted upon a written stipulation, waiving a jury, that there was no fraud in obtaining the decree.

Upon the decree of the State court, Overman, administrator of Stutzman, on the 15th September, 1873, commenced an action against Mitchell in the Circuit Court of the United States for the Southern district of Ohio. The defense is placed upon the ground that Stutzman was dead when, on the 10th of November, 1872, the decree in the State court was, in fact, entered; and, for that reason, the decree, it is claimed, is absolutely void. The defense was held insufficient, and judgment was rendered against Mitchell for the full amount of the Iowa decree. It is assigned for error, that the facts found do not authorize the judgment in the circuit court.

The common law was in force, in Iowa, during the whole period from the commencement to the conclusion of the suit in the State court, except as modified by sections 3469, 3470, 3472, 3473, 3477, and 3478 of the Iowa code of 1860, and by the act of April 8, 1862. The latter act—of which, as well as of the State code, we must take judicial notice—substitutes, for one of the sections of the code, the following provision: "Actions, either *ex contractu* or *ex delicto*, do not abate by the death, marriage, or other disability of either party, nor by the transfer of any interest therein, if, from the legal nature of the case, the cause of action can survive or continue. In such cases, the court may, on motion, allow the action to be continued by or against his legal representative or successor in interest; but in case of death of the defendant, a notice shall be served upon his representative under the direction of the court."—Laws of Iowa, 1862, p. 229. These statutory provisions prescribe the manner in which actions may be revived, and the time within which such revivor must take place. But it is clear that they do not provide for a case like the one before us. The question here is, whether the State court was wholly without jurisdiction to enter the decree against Mitchell as of, or make it take effect from, the last day of the term at which the cause, during the life-time of Stutzman, was finally submitted for determination. We are not informed by any decision of the Supreme Court of Iowa, to which our attention has been called, that this precise question has been passed upon in that tribunal. The cases, cited from that court, do not, in our opinion, meet the question, in the exact form in which it is here presented. Its disposition must, therefore, depend upon the rules of practice which obtain in courts of justice, in virtue of the inherent power they possess.

The adjudged cases are very numerous, in which have been considered the circumstances under which courts may properly enter a judgment or decree as of a date anterior to that on which it is, in fact, rendered. We deem it unnecessary to present an analysis of the authorities (some of which are cited in a note to this opinion), but content ourselves with saying that the rule established by the general concurrence of the American and English courts, is that, where the delay in rendering judgment or decree arises from the act of the court, that is, where the delay has been for its convenience, or has been caused by the multiplicity or press of business, or the intricacy of the questions involved, or for any other cause, not attributable to the laches of the parties, but within the control of the court, the judgment or decree may be entered retrospectively, as of a time when it should or might have been entered up. In such cases, upon the maxim *actus curiæ neminem gravabit*—which has been well said to be founded in right and good sense, and to afford a safe and certain guide for the administration of justice—it is the duty of the court to see that the parties did not suffer by the delay. Whether a *nunc pro tunc* order should be made depends upon the circumstances of the particular case. It should be granted or refused, as the justice of the cause may require. These principles control the present case. Stutzman was alive when the cause was argued and submitted for decree. He was entitled, at that time, or at the term of submission, to claim its final disposition. A decree was not then entered because the case, after argument, was taken under advisement. The delay was altogether the act of the court. Its duty was to order a decree *nunc pro tunc*, so as to avoid entering an erroneous decree.

We attach no consequence to the fact that, while the cause was under advisement as to a final decree, Mitchell asked and obtained leave to amend his answer. The leave was granted upon terms, but as the terms were not complied with, the amendment was stricken from the files. The question must, therefore, be determined as if no amendment of the pleadings had been attempted.

It is scarcely necessary that we should extend this opinion by any comments upon the numerous cases cited in the printed argument of appellant's counsel. Many of them are cases where, although the death occurred after the submisson of the cause or after verdict, the judgment was, in fact, entered as of a time subsequent to the death. Such cases manifestly have no bearing here, where the decree in the State court was entered as of a time when the party was alive, and to take effect from the date when the decree would have been entered, but for the act of the court, induced by causes beyond the control of the parties.

It seems to us to be entirely clear, that the State court had the power, upon well-settled rules of practice, both in courts of law and of equity, to enter the decree as of the term when, in the life-time of Stutzman, the cause, after argument, was finally submitted for decision.

The decree is affirmed.

NOTE.—Bank U. S. v. Weiseger, 2 Pet. 481; Clay v. Smith, 3 Pet. 411; Griswold v. Hill, 1

Paine C. C. 484; Gray v. Brignardello, 1 Wall. 636; Campbell v. Messer, 4 Johns. Ch. 342; Vroom v. Ditmas, 5 Paige, 528; Wood v. Keyes, 6 Paige, 479; Perry v. Wilson, 7 Mass. 393; Currer v. Lowell, 16 Pick. 170; Stickney v. Davis, 17 Pick. 169; Springfield v. Wooster, 2 Cush. 62; Hess v. Cole, 3 Zabr. 116; Cumlin v. Ware, 1 Str. 426; Astley v. Reynolds, 2 Str. 916; Davies v. Davies, 9 Vesey, 461; Belsham v. Percival, 2 Cooper's Cases, in time of Lord Cottenham; Green v. Cobden, 4 Scott's Cases, 486; Lawrence v. Hodgson, Y. & J. 370; Freeman v. Tranah, 12 C. B. 406; Collinson v. Lester, 1 Jurist, P.N. S. 835; s. c. 20 Beavan's Rolls Court, 355; Blaisdale v. Harris, 52 N. H. 191; 2 Daniel's Chy. Pr., pp. 1017, 1018, (5th Amer. ed.); Tidd's Pract. 952 (4th ed., with American Notes); 1 Barbour's Chy. Pr. (2d rev. ed.,) 341; Freeman on Judgments, § 57, and other authorities cited by those authors.

MARRIED WOMAN — CAPACITY TO CONTRACT—EQUITY.

NEEF v. REDMON.

Supreme Court of Missouri.

Where a married woman contracts with the owner of real estate for the purchase of land, and pays a part of the purchase money and undertakes to pay the balance within a certain time, when the landowner agrees to convey the title, she acquires such an equitable interest in the property as will be protected from a subsequent grantee, who took with knowledge of such a state of facts.

HENRY, J., delivered the opinion of the court:

Mary Neef contracted, in writing, with L. S. Hazell for the purchase of an undivided half of a lot of ground owned by said Hazell, paying him $5 of the purchase money, $350, and agreeing to pay the balance on or before the 18th day of December, 1877, at which time, on payment of said balance, Hazell was to execute a deed conveying said interest. On the next day after the contract was made, the defendant proposed to and did purchase the said Hazell's interest and received a deed therefor. It is charged in the plaintiff's petition, and there was abundant evidence to the effect that defendant, before his purchase, was informed of the particulars of the contract between plaintiff and Hazell, and took advantage of the intoxication of the latter to procure the sale and conveyance to himself of the property in controversy. After the sale and conveyance to the defendant, Hazell, in pursuance of his contract with Mrs. Neef, executed a deed conveying to her the said property, and this is a suit to set aside the deed from Hazell to the defendant, and for general relief. On the hearing of the cause the circuit court found for plaintiffs, and entered a decree vesting the legal title to the lot in Mary G. Neef, and defendant has prosecuted his appeal.

This is a case of the first impression in this court, and there is a lamentable dearth of authority on the question involved. "As a general rule a married woman can not, except in special cases, contract as a *feme sole*, nor as such sue or be sued." Cord. on Rights of Married Women, sec. 532. "Any form of contract which she may make is as to her a nullity." Bishop on the Law of Married Women, vol. 1, sec. 39. But it by no means follows that one can not bind himself by a contract with her. She can not bind herself personally by any contract she may make.

It is not like most contracts of an infant, voidable only, but while it remains wholly unexecuted on her part, is absolutely void. Not binding her, it can not be enforced against the party contracting with her. The element of reciprocity or mutuality is absent. A contract executed by her in whole or in part, and remaining executory on the part of the person contracting with her, occupies a different footing. If she has executed her part of the contract, he can not say there is no consideration for his agreement. "If she has done all on her part required by the contract, it will be enforced against the other party;" and it makes no difference that she could not have been compelled to perform the agreement. Bishop on the Law of Married Women, sec. 250, 2d vol. "But if the agreement rests merely in mutual promises, then, in principle, as the promise of the married woman is a nullity, it can not constitute a consideration for the promise of the other party, therefore it is void as to him." Conceding that he might rescind the contract by tendering to her what he had received, in part performance of the contract on her part, shall he retain what he has thus received, and refuse to perform his contract, on an offer by her to complete the performance on her part? It is not the case of a mere payment of money on a verbal contract and an attempt to enforce specific performance, because there has been a part performance of the contract. Here is a contract in writing, signed by the party to be charged, and while the contract as to the other party is a nullity, as long as it is entirely executory on her part, and therefore not binding on him, it ceases to be a nullity as to him when she has executed her agreement either in whole or in part. If, after having received a part of what she was to give, he may still rescind the contract, because he can not compel the performance of the balance of her contract, equity will not let him do so without returning or offering to return what he may have received from her in part performance; but will regard the contract as possessing sufficient vitality, as against him, to enable her to get what she bargained for, unless he will place her in *statu quo* by returning what he has received from her.

The principle which exonerates her from personal liability on any contract she may make, is a shield for the protection of herself and husband,

and is not to be used as a weapon for their destruction. "If an infant disaffirms a sale he has made, and reclaims the property he sold, it seems now well settled that he must return the purchase money." Parsons on Contracts, vol. 1, p. 321. Until the return of the money received in part payment for the property from a married woman, by one who has contracted with her, she has an equitable interest in the land bargained for, and anyone purchasing, with notice of her contract, does so at his peril.

In the case of Chamberlain v. Robertson, 31 Iowa, 410, somewhat similar to the case at bar, there was a purchase by a married woman of a tract of land and part payment of the purchase-money. The defendant refused to convey to her on the ground that she was a married woman; and as the contract could not have been enforced against her, neither could it be enforced against him.

In delivering the opinion of the court, Beck, J., observed: "Admitting that the contract, if it had not been performed, or partly performed, by the plaintiff, could not have been enforced against her, it does not follow that defendant, for that reason, would be relieved from its obligation." It is proper to add that a majority of the court in that case held the plaintiff entitled to relief on the ground that she paid part of the purchase-money, had taken possession of the land and made improve-ments thereon, and because of the beneficial nature of the transaction as to her.

So far as the statute of frauds has any application to the case, it is fully satisfied by the signature of the defendant to the contract; and while he might have avoided that contract as long as it had no consideration to support it, except promise or agreement of a married woman, that is a matter of controversy outside of the statute of frauds; and the receipt of a part of the purchase-money, and an attempted rescission without returning or offering to return it, is a matter of which equity will take cognizance. Here there is a contract in writing to satisfy the statute of frauds, and a right under that contract by reason of its part performance by the plaintiffs, which a court of equity is bound to protect and enforce against one who purchased the property with full knowledge that it had been previously purchased, and partly paid for by her.

The case stands with the payment of only five dollars, as if all the consideration were paid but five dollars. The principle involved is precisely the same. If Hazell had offered to return the five dollars received of the plaintiff, a different question would have been presented; but as it is not in the case, we would not be understood as deciding it. So far from offering to return to her the money she paid, he has received the balance without any objection, and executed a deed conveying to her the property.

The judgment is affirmed; all concur except Sherwood, C. J., who dissents.

ESTOPPEL—BILL OF EXCHANGE—FORGED INDORSEMENT—SILENCE—DELAY.

MACKENZIE v. BRITISH LINEN CO.

House of Lords, February 11, 1881.

Continued silence on the part of a person whose signature upon a bill of exchange has been forged is not sufficient to preclude him from alleging the forgery, unless his conduct has prejudiced the position of the holder of the bill.

This was an appeal against the judgment of the First Division of the Court of Session in Scotland.

The British Linen Company instituted the present proceedings as holders of a bill of exchange for £70 against Duncan Mackenzie, as one of the drawers and indorsers of the bill. In February, 1879, John Fraser, of Inverness, discounted with the British Linen Company a bill of exchange at two months' date, for £76, purporting to be drawn and indorsed by Duncan Mackenzie and John Macdonald, and to be accepted by the said John Fraser. The bill fell due on the 10th of April, 1879, and was dishonored. Notice of dishonor was sent to the two drawers and indorsers, but no answer was received from either of them. On the 14th, Fraser went to the offices of the company with a bill of exchange, which was drawn, accepted and indorsed in blank, and which purported to bear the same signature as a former one, and he asked for a renewal. He paid £6 on account, and the new bill was filled in for £70 at three months' date.

The second bill fell due on the 17th of July, and on the 18th, notice of dishonor was sent to the two drawers and indorsers. No answer to this was received, but after the matter had been put in the hands of the solicitors to the British Linen Company, Mackenzie, for the first time, intimated that he had never drawn or indorsed either of the bills. Fraser was afterwards tried and convicted for forging the names of Mackenzie and Macdonald upon the bills.

The Lord Ordinary (Lord Adam) held that Mackenzie was not precluded from pleading that his signatures had been forged. This decision was reversed by the First Division of the Court of Session in Scotland, the majority of the judges (the Lord President, Lords Deas and Mure) holding that Mackenzie's conduct amounted to an adoption of the forged signatures, since it had deceived the British Linen Company, and had led them to believe that the signatures were genuine. Lord Shand concurred with the Lord Ordinary. Mackenzie then (*in forma pauperis*) appealed to this House.

A fuller statement of the facts of the case will be found in the judgment delivered by Lord Blackburn.

Brand, of the Scotch bar, and *Rhind*, of the Scotch bar, for the appellant; *Balfour* (*S. G.* for Scotland), and *Chitty*, *Q. C.*, for the respondents.

Cur. adv. vult.

Lord SELBORNE, C.—There are two questions in this case: First, whether the appellant authorized or assented to the signature of his name as drawer and indorser of the bill of exchange of the 14th of April, 1879; second, whether, if he did not do so, he has nevertheless so acted as to be estopped from denying his liability on that bill as between himself and the respondents. If the first question is to be answered in the appellant's favor, I am clearly of opinion that the circumstances of the case raise no estoppel against him. He has done nothing by which the respondents can have been led to act in any way in which they would not otherwise have acted, or to omit to take any step for their own security, or in any sense for their own benefit, which they would otherwise have taken. He has done nothing from which the respondents or a court of justice could reasonably infer that he adopted the bill or admitted his liability upon it.

The merits of the respondents appear to me to be extremely small. They took from Fraser the first bill for £76, with the signatures of the appellant and Macdonald, without any knowledge of these parties or of their handwriting, and without any inquiry whatever. The bill had not been previously in circulation. Fraser offered it to the respondents to obtain a loan for his own benefit, for the purpose of paying for a grocery business at Inverness. After the first bill became due (*i.e.*, on Saturday, April 12) they caused notices to be given to the appellant and Macdonald, both of whom resided at some little distance from Inverness; but on the following Monday, before any reply had been, or could reasonably have been expected to be, received, they gave up the bill to Fraser in exchange for £6 in cash and another bill which was signed in blank with the same names, and which was then filled up by Fraser for £70. It is impossible for the respondents to contend that any conduct or silence on the appellant's part caused them to take either the first or the second bill, or to abstain on the 14th of April from doing anything for their own security which they would otherwise have done. On the 14th of July, before the second bill fell due, and again on the 18th and 21st of July (when it was overdue), the respondents gave notice to the appellant, and on the 29th of July they were informed that he denied his signatures and liability. There is no principle upon which the appellant's mere silence for a fortnight, during which period the position of the respondents was in no way altered or prejudiced, can be held to be an adoption or admission of liability, or to estop him from now denying it. What took place during the interval was unknown to the respondents, and has, in my opinion, no tendency to show that, in point of fact, the appellant was then liable, or admitted himself to be liable, or intended to become so. On the 18th or 19th of July he communicated with Mr. McGillivray, a law agent, expressly on the footing that his name had been forged, and that he was not liable. It is clear that McGillivray was desirous, if possible, to get some settlement made which would avoid criminal proceedings against Fraser, and that the appellant was willing that this should be done, so long as he was not thereby made liable on the bill. No such settlement was arrived at, and I can not discover in what took place any ground, in fact or in law, for saying that the appellant ought to be held to have become liable, through what passed between himself and Fraser and McGillivray, if he was not liable before.

Hence the question becomes, in my judgment, one of fact only—namely, whether the appellant did or did not assent to or authorize the use made of his name by Fraser on the 14th of April, and I think that the *onus probandi* is upon the respondents, it being admitted that the appellant's signature is not genuine. The question turns entirely upon what took place when the appellant met Fraser on that day. If it is shown that he then knew, or had reasonable grounds to believe, that a new bill with his name upon it had been given by Fraser to the respondents, it would be an inevitable conclusion that he assented to and became bound by the use thus made of his name, and therefore the evidence of Fraser and his father, if it is to be believed, would be conclusive against the appellant. Now, apart from the fact that Fraser is admitted to have been guilty of forgery, while the only witness who corroborates him is necessarily identified with him in feeling and in interest, the Lord Ordinary, who heard and saw all the witnesses, gave credit to the appellant. Both the latter and Macdonald distinctly deny any knowledge that a second bill had been given, and (*a fortiori*) that it had been given in their names. The appellant swears that Fraser gave him the first bill, and positively assured him that he had taken it up by payment and not by renewal; but there are, no doubt, some suspicious circumstances which are not satisfactorily explained, especially his failure to inform the respondents of the first forgery, and his delay in informing them of the second, and which might lead me to a different judgment if the *onus probandi* lay upon the appellant. It is, however, evident that he had not a very sensitive feeling on the subject of forgery, so long as he did not himself suffer by it, and the admission of the first forgery might suggest precautions against future forgeries; but, while with the first bill in his hands, he had no reason to fear anything from the notice which the respondents had sent to him. I do not say that his conduct was commendable or satisfactory; but it does not require for its explanation that he had any belief or suspicion that his name had been forged a second time. Since the respondents have failed to satisfy the *onus* which appears to me to rest upon them, I propose to your lordships to allow the appeal.

Lord BLACKBURN.—In this case a majority of three judges of the First Division of the Court of Session, Lord Shand dissenting, have reversed the decision of the Lord Ordinary, who tried the

cause and saw and heard all the witnesses, thus having an advantage not possessed either by the judges of the first division or by your lordships. The case, therefore, seems to me to come before this House without any great preponderance of authority.

It is not disputed that the respondents' agent discounted for Frazer a bill for £76, at two months, dated the 7th of February, 1879, and purporting to be drawn and indorsed by the appellant and Macdonald, and drawn upon and accepted by Fraser, it being understood that when the bill fell due, the amount should be reduced and a new bill be given and discounted for the balance. The agent acted entirely upon Fraser's representations, and it is now admitted that the signatures of the appellant and Macdonald were forged. The bill fell due on the 10th of April, and was dishonored. On Saturday, the 12th of April, notice of dishonor was sent to the appellant by post, and on the following Monday morning Fraser brought the agent a bill drawn, accepted and indorsed in blank, and bearing the same signatures as the former one. It was, after some discussion, filled up for £70 at three months, and Fraser paid £6 and the expenses. Fraser took away the old bill, and your lordships have to decide whether, upon the facts in evidence, the appellant is liable upon the second bill. Thus far it seems to me to be clear that both bills were discounted entirely upon the faith of Fraser's representations. The appellant never informed the respondents or their agents that his signature upon the first bill had been forged. The second bill fell due on the 17th of July, and was dishonored, but three days earlier the respondents sent the appellant notice that it was about to become due, and on the 18th the usual notice of dishonor was sent to him. Legal proceedings were threatened, and on the 29th of July the respondents' agent learned for the first time from McGillivray that the appellant's signatures had been forged.

The effect to be given to the disputed facts must, of course, depend upon the credibility to be given to the witnesses; and as to this there has been much difference of opinion among the learned judges in Scotland, and the statement of Fraser and appellant are, as might have been anticipated, in direct conflict. Lord Shand and the Lord Ordinary believe the appellant's statement that he never knew or suspected that his name was upon the second bill till he got the notice of the 14th of July; but the Lord President and Lord Mure believe, in contradiction of his evidence, that he was aware of it, the Lord President apparently thinking that he had been a participator in Fraser's fraud upon the respondents. Lord Deas seems to have proceeded upon another ground, but I wish to point out that some confusion has arisen from not sufficiently separating the different questions in the case. Since it is now admitted that the appellant never wrote his name upon the bill, and that all the signatures upon it were written by Fraser, the burden lies upon the respondents to show that the appellant is liable. If the latter authorized Fraser to sign his name, he is of course responsible and Fraser was not guilty of forgery; but even if he did not originally authorize the signing of his name, he would be liable if, knowing that his name had been written without his authority, he ratified the act; for the maxim "*Omnis ratificatio retrotrahitur et mandato priori æquiparatur*," would be applicable.

I wish, however, to guard myself against being supposed to say that if a document with an unauthorized signature was uttered under such circumstances of intent to defraud that the uttering amounted to a forgery, the person whose name was forged could ratify it so as to make a defense for the forger against the criminal charge. I do not think he could do so; but by ratifying the act he makes himself civilly responsible to the same extent as if he had authorized it in the first instance, and it is immaterial whether he made the ratification to the person who seeks to avail himself of it, or to anyone else.

It appears to me, however, that the Lord President has not sufficiently distinguished two separate averments in the case, with one of which I fully agree, although the other (upon which the decision of Lord Deas appears to be based) requires, in my opinion, some qualification. As I have already said, if the appellant ratified to any person, or for any purpose, the act done by Fraser while professing to act as his agent, that ratification inures as if he had originally authorized the act, and may be proved by his silence combined with his conduct in other respects. Moreover, even without ratifying Fraser's act, the appellant may have precluded himself from averring, as against the respondents, that his signature was not genuine. Thus (as Lord Deas pointed out) if, by his silence, he led the respondents to believe in the genuineness of his signature until they had lost the opportunity of recovering upon the bill, when they might have used such opportunity if they had known of the forgery, there would be an alteration in the position of the respondents sufficient to preclude him from averring the forgery; but I think Lord Deas goes too far when he says that "in cases of this kind, when he has peculiar means of knowing whether his signature is forged or not, he is not entitled by saying or doing something to lead his neighbors to think that his signature is genuine, to his neighbor's loss;" and, again, that "there was here not only a moral but a legal duty on the part of Mackenzie to have informed the bank that his signature to the first bill was a forgery; and if he had done so, there would not have been a second bill." I not only doubt Lord Deas' proposition that there was a legal duty on the part of the appellant to inform the respondents, but I deny his conclusion of fact. I have already pointed out that the second bill was uttered to the respondents before the appellant could, with the utmost diligence, have informed them that the first one was forged. No

doubt, it would make a great difference if the appellant were proved to have known that the respondents had put the second bill with his name upon it to Fraser's credit. In that case his silence would greatly prejudice the respondents, and even a temporary ratification of the signature might have the same effect as a complete ratification. But if, as he alleges, he did not know, till he received the notice in July, that the respondents had taken the second bill upon the faith of his forged signature, he knew when he received that intimation that no more credit would be given to Fraser and that all the mischief was done. I do not think that, even if he had gone so far in his efforts to shield Fraser as to render himself liable to criminal proceedings for endeavoring to obstruct justice, he would necessarily have been precluded from averring that his signature was a forgery. At any rate, his delay in giving the information to the respondents, and his allowing the respondents to continue till the 29th of July in the belief that the signatures were genuine, would not so preclude him if, as I think was the fact, the respondents neither gave any fresh credit nor lost any remedy which would have been available to them if they had received the information earlier. The principles of law which I have assumed have been recognized in England ever since the clearly-expressed judgment of Lord Wensleydale in Freeman v. Cooke, 2 Ex. 654. I will leave my noble and learned friend who is to follow me to consider the effect of the Scotch decisions which have been referred to, merely observing that they appear to me to be entirely consistent with the principles which I have stated.

I will not say very much as to the question whether the appellant's evidence is substantially true. I think it shows that he doubted Fraser's solvency, and that he would not be likely to have been willing to be surety for him. He asserts that Fraser distinctly assured him that the bill was paid in cash. On the other hand, Fraser has sworn that the appellant authorized him to get his name put upon the renewed bill, but it is not stated why the appellant should not sign it himself. Again, I do not think it is proved that the appellant knew that Fraser could not possibly, with the help of friends or otherwise, have raised the £76 to meet the first bill. Then, as to what passed afterwards, I have no doubt that the appellant would have been content to say nothing about the forgery if Fraser (or his friends) took up the bill and relieved him from responsibility; and if so, he may have delayed making the charge of forgery until he saw whether there was a chance of this being done. I have, however, already pointed out that his delay would not, in my opinion, make him liable to the respondents, unless it in some way prejudiced them. In fact it did not do so, and therefore I agree that the appeal should be allowed.

LORD WATSON.—The sole ground upon which the appellant resists the claim of the respondents upon the bill of exchange is that his signatures as drawer and indorser have been forged. This allegation was denied by the respondents, but the Lord Ordinary held that its truth was established by the evidence. Before the First Division of the Court of Session the respondents do not appear to have impeached the soundness of that conclusion, and the Lord President accordingly states that it must now be taken that the bill was forged. The majority of the First Division gave judgment against the appellant upon two grounds—first, that the appellant was (to use the language of the Lord President) "perfectly aware," or, at least, had very good reason to believe that the first forged bill was replaced by the second forged bill, and that he "permitted that to be done and acquiesced in the proceedings:" secondly, that, assuming such knowledge and acquiescence on the part of the appellant not to have been established, he must, nevertheless, be held to have adopted the second bill by reason of his failure, after receipt of the notice of dishonor, to inform the respondents of the forgery. The first ground of the judgment appears to negative the idea of forgery; for if Frazer, by whom all the signatures were written, wrote and used them with the permission or acquiescence of the appellant, he can not have been guilty of any criminal act. It is, however, unnecessary for me to dwell upon this part of the case, because I agree that the appeal ought to be allowed.

Since the argument before your lordships I have carefully perused all the evidence, and I have formed the same opinion as Lord Shand and the Lord Ordinary. I have come to the conclusion that the appellant is to be believed, and that Fraser and his father are both unworthy of credit. I will, therefore, pass to the second ground of the judgment of the First Division, the alleged adoption of the forgery by the appellant. The facts material to this branch of the case appear to be the following:—1. On the 14th of April, 1879, the appellant became aware that his signatures, as drawer and indorser of a bill of exchange for £76, had been forged by Fraser, who had discounted the bill with the respondents, but he afterwards received this bill from Fraser, who told him that he had paid it in full. 2. The bill had not, in fact, been paid in full, but had been renewed on payment of £6 and a new bill for £70. 3. On the 14th of July, the appellant received a written notice that the second bill would become due on the 17th inst., and on the 18th a regular notice of dishonor was sent to him. 4. On the 21st and 25th of July letters were written to him in which he was threatened with legal proceedings on the bill. 5. On the receipt of the notice of dishonor, he consulted his solicitor, Mr. McGillivray. 6. On the 29th of July, McGillivray told the respondents' solicitor that the signatures of the appellant had been forged. It is not suggested that the position of the respondents was in any way changed between the 17th and the 29th of July, when they were for the first time informed of the forgery,

and therefore it can not be said that they sustained any loss or prejudice through the appellant's silence during that period, and I can not concur with the majority of the judges of the First Division in holding that his silence was, under the circumstances, sufficient to lead to the inference that he adopted the forged bill.

The question whether a forged bill has been adopted by the person whose signature has been forged is an issue of fact, and not of law; but the adoption of the bill may be a matter of legal inference from certain ascertained facts, and the inference which has been drawn adversely to the appellant appears to depend upon the fact that, after he became aware that a second forged bill had been discounted, he kept silence—or, at least, did not inform the respondents of the forgery till nearly a fortnight had elapsed. The only reasonable rule which I can conceive to be applicable to such circumstances is that which was expressed in carefully chosen language by Lord Wensleydale in Freeman v. Cooke. It would be a most unreasonable thing for a man who knew that bankers were relying on his forged signature to lie by and not divulge the fact until he saw that the position of the bank had been altered for the worse; but I think it would be equally contrary to justice to hold him responsible for the bill merely because he did not tell the bank of the forgery at once if he, in fact, gave the information, and if, when he did so, the bank were in no worse position than when it was first in his power to give the information.

I have carefully considered all the Scotch decisions which have been quoted by the counsel for the respondents, and they do not seem in any way to support the proposition that, as to the law of Scotland, mere silence is, in a case like the present, equivalent to the adoption of a forged bill. I therefore think that the appeal must be allowed.

Judgment reversed.

LOG DRIVING IS NOT COMMON CARRIAGE.

MANN v. WHITE RIVER LOG DRIVING AND BOOMING COMPANY.

Supreme Court of Michigan, April 13, 1881.

A common carrier's liability does not attach to a log driving company for failure to deliver part of a quantity of logs received by it to be driven to their destination.

Assumpsit on common and special counts. Plaintiff brings error.

F. W. Cook, for plaintiff in error; *Norris & Uhl*, for defendant in error.

CAMPBELL, J., delivered the opinion of the court:

Plaintiff sued defendant for not delivering part of a quantity of logs, which the company had in charge to deliver at White Lake, after running them down from their place of reception on White River. As the case was passed upon by the jury, they necessarily found that there had been no fault or negligence in defendant, and the only question before us is, Whether defendant was a common carrier, and liable at all events, except for the risks of a public enemy or inevitable casualty?

The duty undertaken by the defendant was in accordance with its statutory power to drive, run, raft and boom logs in White River for any person having logs to float down the stream, and the case shows that the work of all kinds was done at regular rates and for all alike.

The dispute, therefore, is narrowed down to the single question, Whether the handling of logs, as managed by the log driving and booming companies, is properly to be treated as common carriage?

It is admitted to be like common carriage in the universality of the duty, and by statute a lien is given for charges, not only on the specific logs for charges on each, but on a part to secure the whole charges. C. L., sec. 2788. The statute, moreover, gives a special remedy to enforce the liens. It also contemplates, by the section just referred to, that it is only in the absence of express contract that a uniform rate is provided for.

These rights resemble, in important respects, the rights of common carriers. But the statute contains no declaration that the companies shall be so treated, and the whole matter is left to be determined by legal analogies.

When we look at the business done, it will be found to resemble, in some respects, the business of carriage; and in some respects it is like different business, while in most things it is peculiar and subject to its own conditions. It has one peculiarity in which it differs entirely from common carriage, which was held by this court in Fitch v. Newberry, 1 Doug. 1, to create no rights against property not voluntarily entrusted to the carrier. One important part of the compensated business of these companies includes the temporary control of logs interfering with the free running of the body of logs in the stream.

The peculiarity which is most apparent is, that there is no carriage whatever either in vehicles or by application of motive power, unless in some emergency. The logs of various owners are usually, as in the present case, set floating promiscuously, and only sorted and separated when the run is, as to some portion, at least, substantially completed. The logs are floated down the stream by the force of the current, sometimes aided by dams and flooding, and if it were not for the risk of jams, no interference to any great extent would be needed. The chief work of the companies when running and driving logs is to see that they are kept in the way of floating down stream, and not allowed to accumulate in jams and obstruct

the floatage. And it is to prevent this, that the compulsory powers are exercised.

It is manifest that this kind of service differs very much from the possession and transfer of articles which are always in custody, and which could not be moved except by the vehicles of the carrier. Among the somewhat fanciful reasons given for the peculiar duties and responsibilities of common carriers, we can not always determine how far any of them actually operated in shaping the legal rules. But it is dangerous to run after supposed analogies and extend peculiar rules to new cases, substantially different from the old. Courts have no doubt settled the law of common carriers as applying to all classes of carriage, however free from most of the special risks and temptations which were relied on to uphold the ancient doctrines. But when it is sought to extend the rules outside of the carrying business altogether, we should not do this unless on very plain reasons of fitness.

Taking heed to give no excessive force to resemblances, we may find, nevertheless, some other duties which are at least quite as analogous as carriage. Drovers, or as the common law calls them, *agisters*, perform functions not unlike those of log drivers. Their animals move themselves, while logs are moved by the stream; and the beasts have a species of intelligence, while logs and currents move unconsciously. Yet the chief business of the men in charge of both is to prevent the property from straying or stopping, and to guide it where it belongs. No one regards drovers as carriers. Angell on Carriers, §§ 24, 52; Story on Bailments, § 443. The entire absence of any motive power, and the function of guarding and regulating things which move themselves, or are moved by some independent force, make it impossible to treat these classes of business as carriage in fact, and it is difficult to see how, if involving no carriage, there is any propriety in calling them carriage.

There is always hardship, and often wrong, in holding persons liable for what they have done their best to avoid. While we are bound to respect established rules, we can not wisely extend them beyond their reasonable application. We think the court below decided correctly that the extreme liabilities of common carriers did not apply to defendants. The judgment must be affirmed with costs.

The other justices concurred.

NOTE.—In Shaw v. Davis (1859), 7 Mich. 318, it had been already held that parties who had made a special contract to take a lot of staves upon their raft to a certain point, were not liable as common carriers for the loss of a portion of them. It did not appear that they were to be compensated for any risks in running the staves, and, as they did not expressly assume all risks, they were only bound to ordinary care and diligence. In the similar case of Pike v. Nash (1864) 1 Keyes, 335; 3 Abb. App. Cas. 610, parties who had contracted to cut and raft to New York a quantity of dock sticks, piles and spars, some of which were lost because of an unusual flood, sued for compensation, and it was held that they were not common carriers in respect to the property they were transporting, and that their duty extended no farther than the exercise of ordinary prudence, care and skill in protecting the property from loss and damage; the work appeared to have been done under a special contract made in reference to this special property, and there was no reason to suppose that they had ever acted as common carriers before.

An analogy which seems in some respects closer than the one suggested in the opinion would be that of a tug-boat, concerning the character of which as a common carrier there has been much dispute. In Leonard v. Hendrickson (1851), 18 Pa. St. 40, an action on the case had been brought for the value of timber carried adrift by a rise in the river after being taken in tow by the defendant, whose usual employment was towing rafts, etc., on the Monongahela. The claim was founded exclusively on defendant's being a common carrier, but the court held that he was not, as his control of the vessel in tow was limited. The case of The Oconto (1873), 5 Biss. 460, was a libel to recover a penalty for not having been inspected. The boat was a steam tug employed in towing lumber, rafts and scows. The court held that it was not a common carrier of either passengers or freight, but discharged a mere towing duty.

The question has often arisen in reference to the liability of tug boats for loss or damage to vessels in tow. In 1835 it was decided in Caton v. Remmey, 13 Wend. 387, in view of the special circumstances of the case. The master of a steamer was asked to take in tow a freight boat that was old, rotten and unseaworthy. He objected that the boat was too heavily laden, but the owner insisted on being towed. It did not appear that the steamer was in the business of towing. The water was rough and the tow sank. The law of common carriers was declared inapplicable, and it was held that the defendant was not an insurer of the vessel towed. In 1842 it was held by Bronson, J., in Alexander v. Greene, 3 Hill, 9, that parties who "carry on the business of towing boats laden with merchandise and produce, and are undoubtedly willing to engage for all who may desire their services," are, nevertheless, not common carriers. "They do not receive the property into their custody, nor do they exercise any control over it other than such as results from the towing of the boats in which it is laden. They neither employ the master and hands of the boat towed, nor do they exercise any authority over them beyond that of occasionally requiring their aid in governing the flotilla. The goods or other property remain in the care and charge of the master and hands of the boat towed. In case of loss by fire or robbery, without any actual default on the part of the defendants, it can hardly be pretended that they would be

answerable; and yet carriers must answer for such loss." This decision was reversed by the court of errors in 7 Hill, 533; but in the case of Wells v. Steam Navigation Co. (1849), 2 Comst. 204, Judge Bronson admitted the reversal and added: "But what particular point or principle of law was decided by the court, or what a majority of the members thought upon any question of law, no one can tell. It appears by the reporter's head-note that he could not tell; and upon his note at the end of the case, it is apparent that the court itself could not tell. Two merchants and two lawyers thought the defendants were common carriers, while other senators expressed a different opinion and went upon other grounds." In this case, which was an action on the case for the loss of a canal boat in tow, he also said: "It is a great misnomer to call the defendants common carriers of any kind in relation to the business of towing boats."

In various other States, however, it had been repeatedly decided that steam-tugs were common carriers [Smith v. Pierce (1830), 1 La. 354; Davis v. Houran (1843), 6 Rob. (La.) 259; Clapp v. Stanton (1868), 20 La. Ann. 495; White v. Mary Ann (1856), 6 Cal. 462; Walston v. Myers (1857), 5 Jones, N. C. L. 174], and they were so classed by Chancellor Kent in his Commentaries, 599. Judge Story, on the other hand, clearly stated that "the owners of a steamboat who undertake to tow freight-boats for hire, or undertake to tow vessels in or out of port for hire, are not common carriers, but are responsible only for ordinary skill, care and diligence in their undertaking." Story on Bailments, § 496. The question, being fairly at issue, was reviewed in Brown v. Clegg (1869), 62 Pa. St. 51, and in Bussey v. Miss. Valley Trans. Co. (1872), 24 La. Ann. 165. These opinions cited numerous authorities and came to different conclusions. The first case was *assumpsit* for charges for towing coal barges, of which one was lost. The court held that steam-tugs are not liable as common carriers for the safety of vessels which they are towing, or of their cargo, and said "the common-law rule (as to common carriers) applied only to goods, and not to vessels or boats. * * * Towage by steam is a different and new business, to which should be applied the ordinary rules of bailees for hire. Leech v. Owner of Steamboat Miner (1848), 1 Phila. 144. The opinion cited Merrick v. Brainard (1860), 38 Barb. 574; Abbey v. Steamboat R. L. Stevens (1861), 22 How. Pr. 78; Steamboat Angelina Corning (1867), 1 Ben. 109, and other cases less in point. It was followed by Judge Sharswood in Hays v. Miller (1874), 77 Pa. St. 238.

The contrary case of Bussey v. Miss. Valley Transp. Co., was an action for neglect to deliver a barge and cargo that had been received by defendant to tow, for hire, between St. Louis and New Orleans, and judgment was given for the value of the barge and cargo, with interest from judicial demand. The appellate court affirmed the judgment, and neatly distinguished the cases in which a tug-boat would or would not be a common carrier. A tug-boat "may be employed as a mere means of locomotion, under the entire control of the towed vessel; or the owner of the towed vessel and goods therein may remain in possession and control of the property thus transported, to the exclusion of the bailee; or the towing may be casual merely, and not as a regular business between fixed termini." In these cases the tug is not a common carrier; but she is, if "she plies regularly between fixed termini, towing for hire and for all persons, barges laden with goods, and taken into her full possession and control, and out of the control of the bailor, the property thus transported."

But on the whole it is now considered settled, that a tow-boat engaged in the business of towing is not for such purposes a common carrier, nor subject to its liabilities. Arctic Fire Ins. Co. v. Austin (1869), 54 Barb. 559; Varble v. Bigley, 14 Bush, 698. With a single exception (Vanderslice v. Steam Tow-boat Superior, decided in 1850 by Judge Kane of the United States District Court), the national courts have held the same doctrine. The Lyon (1861), 1 Brown Adm. 59; Brawley v. Steamboat Jim Watson (1870), 2 Bond, 356; The Neaffie (1870), 1 Abb. U. S. 465; The Stranger (1871), 1 Br. Adm. 281; The Merrimac (1874), 2 Sawy. 586; The Margaret (1876), 94 U. S. 494; Transportation Line v. Hope (1877), 95 U. S. 297. In The Lyon, Wilkins, district judge, said: "The contract is one of mere transit pilotage, and not of freight or carriage. The occupation of the common carrier is to carry at all hazards; the business of the steam-tug is simply to afford the advantage of steam power to sail-vessels wind-bound." Substantially the same view was taken by Judge Woods in the case of The Neaffie, and by Miller, district judge, in The Oconto, 5 Biss. 460. The decision in the case of the Neaffie was given in the district court of Louisiana before that in the case of Bussey v. Miss. Valley Trans. Co. The same position as that taken by Judge Campbell in the foregoing opinion was taken by the court, which stated that "unless the case of steam-tugs towing boats and their cargoes can be brought strictly within the definition of common carriers, I am not disposed to apply to them the great rigor of the law applicable to common carriers."

One question remains: If tugs are not common carriers, what are they? Judge Bronson said, in Alexander v. Greene, 3 Hill, 9, that they would be held to the same rule of responsibility as ordinary bailees for hire; but in Wells v. Steam Navigation Co., 2 Comst. 204, he said they were not bailees of any description, for the property towed is not delivered to them, nor placed within their exclusive custody or control. In Arctic Fire Ins. Co. v. Austin, 54 Barb. 559, the court said that the defendants were liable for negligence in performing the special duty they had undertaken, and not otherwise. In the case of The Merrimac, 2 Sawy. 586, Deady, district judge, criticises Judge Bron-

son's remark as a *dictum*, and says: "The contract to tow the scow and her cargo * * * * was one of the hire of the carriage or transportation of the same for a compensation, and was, therefore, a bailment of the kind denominated *locatio operis mercium vehendarum*. * * * * This is a bailment which is beneficial to both parties, and the bailee is responsible for ordinary skill and diligence."

The conclusion is, that tug-boats are not common carriers, because they would not be at common law, and the severe liabilities of carriers should not be imposed on them, and because their control of vessels in tow is not exclusive, and they are not insurers. But they are liable on their contracts or as bailees for hire. Similar considerations, except as regards the control of logs, would probably apply to log-driving companies with much greater force. H. A. C.

ABSTRACTS OF RECENT DECISIONS

SUPREME COURT OF THE UNITED STATES

October Term, 1880.

FRAUD — LIABILITY OF OFFICERS OF BANKRUPT CORPORATION.—In this case, complainant was assignee in bankruptcy of the North Missouri Insurance Company, and defendants are the ex-officers of that institution, and this bill is filed to hold the latter responsible for certain county bonds and other securities, alleged to be the property of the company, converted to their own use by the defendants. The proof showed that the securities in question were not the property of the bankrupt company, nor were they converted by the defendants to their own use; they merely borrowed the bonds from their real owners to exhibit as the property of the company to the official examiner of insurance companies, and delude him into a false estimate of the means of the company. After having served this purpose, the bonds were returned to their owners. It is *held*, 1. Tha complainant in showing the possession of the bonds in defendants showed also the character of that possession; that the company had no title to the bonds, but only held them on a temporary loan for a specific purpose, and that defendants could not have defrauded the company's creditors of the bonds, because they were not the property of the company. 2. That the fraud was not against the creditors of the company, and the assignee can not pursue the defendant for the fraud, because the bill is not framed upon that foundation, but distinctly on the ground of conversion of the funds of the company, and because, as the company did not own the bonds, it was defrauded of nothing. 3. It is neither alleged nor proved that any creditor was misled by the exhibition of these securities; and, 4. That if any such creditors were so misled to his loss by the exhibition of the bonds, he would be entitled to the remedy, not the assignee, for the benefit of all the creditors. Affirmed. Appeal from the Circuit Court of the United States, for the Eastern District of Missouri. Opinion by Mr. Justice MILLER.—*Walker v. Reister.*

PATENT LAW — INFRINGEMENT.— Wicke, the plaintiff in this case, patented a machine for driving more than one nail at a time in the process of making boxes. He employed for this purpose a combination of grooved spring-jaws, plungers, cams, disk-shaped collars, treadles, etc., each of which was old; but their combination and application to the purpose of driving nails, more than one at a time, was new, and he was entitled to a patent for the combination and application. His machine operated *vertically*. He complains that defendant's machine infringes upon his as using the instrumentalities employed by him. It appears, however, that Ortrum's machine operates *horizontally*, and dispenses with several of the appliances of Wicke's machine, substituting natural causes for machinery to effect the same purpose; for example, instead of the spring-jaws used to guide the nail, he merely lays it in a groove, where by force of gravity it remains until driven into the wood. This machine will not operate vertically, nor will Wicke's machine operate horizontally. It is *held*, that there was no infringement. Affirmed. Appeal from the Circuit Court of the United States, for the Southern District of New York. Opinion by Mr. Chief Justice WAITE.—*Wicke v. Ortrum.*

COUNTY BONDS — ESTOPPEL.— Under art. 7, of the Constitution of Illinois, the counties of that State were authorized to change their county government from county courts to supervisors, and counties not under the latter organization had their fiscal affairs controlled by county courts. The Grayville & Mattoon R. Co., by its charter, was authorized to receive subscriptions to stock from counties, which, by the same act, were authorized to subscribe and issue county bonds if a majority of the voters of the county at an election called by the county court should vote in favor of such subscription. The County of Jasper was under supervisor organization, and its board of supervisors called upon the voters of the county to vote April 7, 1868, whether or not the county should subscribe $100,000 and issue bonds therefor. The result of the election was in favor of the subscription, and on March 27, 1869, an act was passed by the legislature relating to the railroad in question, which legalized all elections held for the purpose of voting stock to it, and the subscriptions to it under such elections. By virtue of the election of April 7, 1868, the supervisors issued the bonds which it authorized, but none of them bore date prior to October 19, 1876. It may here be stated that all this time there was in the County of Jasper a county court, as

well as a board of supervisors. On the 14th of April, 1875, an act was passed which authorized counties, cities, etc.," to issue bonds in lieu of existing indebtedness, provided the new bonds were authorized "by a vote of a majority of the legal voters voting," etc.; and under this act an election was held April 3, 1877, and a majority of the voters of Jasper County voted to fund the former bonds, and new bonds were thereupon issued in lieu of the old ones, reducing the rate of interest from ten to seven per cent., and extending the maturity to 1897. The plaintiff in this cause, being the holder of part or all of the original bonds, had taken new bonds in lieu, and brought suit upon the coupons of the latter. There was judgment in his favor in the court below, and the county sued out a writ of error. It is *held*, that the county is estopped from setting up the alleged invalidity of the original bonds as a defense to this action. The law under which they were issued was sufficient. The only objection is that there was a mistake in carrying it into execution, in that the election should have been called by the county court, not by the board of supervisors. Had there been nothing more, the bonds would have been invalid (Schuyler Co. v. People, 25 Ill. 185); but under the Constitution of 1848 the legislature could authorize (but not command) the corporate authorities to subscribe even without a vote of the people; that at a second election the people voted to treat the outstanding bonds as "binding and subsisting legal obligations;" that they offered the new bonds at a reduced rate of interest in lieu of the old; and their offer having been accepted, they are estopped from insisting on an irregularity which they have waived. Affirmed. In error to the Circuit Court of the United States for the Southern District of Illinois. Opinion by Mr. Chief Justice WAITE.—*County of Jasper v. Ballou.*

SUPREME COURT OF KANSAS.

April, 1881.

HUSBAND AND WIFE—MORTGAGE OF HOMESTEAD—HUSBAND'S CREDITORS—INTEREST.—1. A loan of $1,650 was obtained on the note of B, secured by a mortgage of himself and wife on their homestead; as B was insolvent, before signing the mortgage, a parol contract was made between B and his wife, whereby it was agreed and understood that the money procured on the note and mortgage should be paid to her as the consideration for the execution of the mortgage on her part. The money, thus obtained, was deposited in the bank in the name of the wife, subject to call. *Held*, that the incumbering of the homestead by the wife executing the mortgage, was a sufficient consideration on her part for the parol agreement; that the money so deposited was the personal property of the wife, and not subject to the demands of the creditors of her husband. 2. Where the jury find for the plaintiff in the sum of $1,161,64, with interest, at seven per cent. per annum from Jan. 17th, 1877, to date, the court, in rendering judgment, ought to take into consideration such interest, as the total damages assessed can be computed from the face of the verdict with mathematical certainty. Affirmed. Opinion by HORTON, C. J.—*Citizens' Bank v. Bowen.*

HOMICIDE—MALICIOUS INTENT—EVIDENCE.—1. In a criminal prosecution for murder in the first degree, the trial court refused to give to the jury the following instruction: "The jury are further instructed that the fact alone by itself, that the deceased was killed by the defendant, is not sufficient to establish a malicious intent." *Held*, that while in many cases the above instruction would be good law, in the present case, for reasons given in the opinion, the instruction would be misleading and erroneous, and therefore that the trial court did not err in refusing to give it. 2. In such criminal prosecution, where the trial court gave ample instructions to the jury with regard to insanity and diseases of the mind, without, however, mentioning any specific drug or liquor as a cause for the same: *Held*, nevertheless, that the trial court did not err in refusing to give an instruction referring to morphine as a cause for such supposed insanity or diseases of the mind. 3. And further *held*, in such case, that the trial court did not err in refusing to give any instructions referring to insanity where such instructions were substantially given in other instructions. 4. And where the defendant in a criminal case asked the court to instruct the jury that, "in order to entitle the defendant to an acquittal, he is required only to raise a reasonable doubt as to his sanity," and the court modified the instruction, and gave it as follows: "In order to entitle the defendant to an acquittal, he is required only, by evidence, to establish a reasonable doubt as to his sanity:" *Held*, that the court did not err. Affirmed. Opinion by VALENTINE, J. — *State v. Mahn.*

NEGLIGENCE — DEATH OF RAILROAD EMPLOYEES—RULES OF THE COMPANY—CONTRIBUTORY NEGLIGENCE.—1. In an action against a railroad company for damages for negligently causing the death of one of its employees, it is not error for the court, on the trial, to exclude evidence, offered by the railroad company, to prove certain written or printed rules, which it claims the deceased wrongfully disregarded, when it is not shown that the deceased ever had any knowledge of such written or printed rules. 2. And in such an action the Supreme Court can not say that the trial court, when submitting the case finally to the jury, committed material error by submitting to the jury such general questions as the following: "10. Was the death of said P caused by the wrongful act or omission of the defendant? 11. Could the defendant, by the exercise of reasonable and ordinary care on its part,

have prevented the injury complained of? 12. Was the death of P caused by the gross negligence of the defendant? 13. At the time of the injury complained of, was P in the exercise of reasonable and ordinary care? 14. At the time of the injury complained of, was P guilty of any negligence that proximately contributed thereto?" Where such general questions as the above are submitted to the jury along with numerous specific questions, and the jury make findings in answer to both the general and the specific questions, then if it can be seen that the general findings are mere conclusions drawn by the jury from the facts found and stated in the answers to the specific questions, the general findings may then be wholly ignored and disregarded, whether they agree with or contradict the specific findings. 3. It is generally error for the trial court to refuse to submit to the jury questions of fact, material to the case, and based upon the evidence. 4. Where a railroad company is in the habit of receiving from other railroads cars loaded with timbers which project over the ends of the cars so as to make it dangerous for any one, except a careful, skilful and prudent person, to attempt to couple the cars together, it is not negligence for the railroad company to order and permit such a person, who has been in the employ of the railroad company doing that kind of business, for about five months, to attempt to make such a coupling, where the attempt is to be made in broad daylight, although it may be raining at the time. 5. It is misleading and erroneous for the court to instruct the jury that negligence, remotely contributing to the injury, is not material when, in fact, if there was any negligence, at all, it was clearly direct and proximate, and not remote or far removed from the injury. 6. Other matters discussed in the opinion. Reversed. Opinion by VALENTINE, J. —*Atchison, etc. R. Co. v. Plunket.*

SUPREME COURT OF MISSOURI.

February, 1881.

CONFLICTING INSTRUCTIONS — EVIDENCE — RIGHTS OF VENDOR AND VENDEE — RENT. — Where an instruction given for the defendant is in direct conflict with one given for the plaintiff, the judgment will be reversed, if for no other reason. The vendee or grantee of land is entitled, from the time of his purchase, to a proportional part of the rent remaining unpaid. After the sale the vendor should not be permitted to enjoy the use of the money paid for the land, and the use of the land also. Rent will follow the reversion, and be payable to the assignee thereof. A decree to which defendant was not a party, and parol evidence in explanation of it, is improperly admitted in evidence against him, and his rights can not be affected or taken away by it. Reversed and remanded. Opinion by NORTON, J.—*Stevenson v. Hancock.*

CONTRACT OF INSURANCE—POWER OF COUNTY COURT, TO MAKE—RATIFICATION—EVIDENCE.— This was a suit by plaintiff, as assignee of the State Insurance Company, on a contract alleged to have been made by the County of Linn with said company for insurance on the court house and personal property in the county offices. The answer denies the contract, and also denies the authority of the county court to make such contract. Judgment was for plaintiff, from which defendant appealed, assigning as error the admission of the following testimony. Carlos Boardman testified that he was presiding judge of the county court in August, 1869, and made the application for the insurance, and was authorized by the county court to do so. Plaintiff then read the application for the policy by Boardman, and introduced C. L. Dobson, who testified he was agent for said company at Linneus at the time the application was made, and received it from Boardman. Orders from the county court were then read showing a ratification of the insurance contract. The policy, premium notes, executed by Boardman, a copy of the order appointing plaintiff assignee of the company, and the deed of the register in bankruptcy assigning to him the effects of the bankrupt, were also read in evidence. This was all the evidence. Defendant asked the following instruction, which was refused: "That, admitting the evidence to be true, the finding should be for defendant." *Held*, that the county court had the right to make such a contract and bind the county by it. Wag. Stat., 441, § 9; 404, § 17; 408, § 3. The contract, though not made by an agent appointed by an order of record, was ratified and affirmed by the court by an order entered of record, and was therefore as binding as if made in the first place by a properly appointed agent. Gasconade County v. Sanders, 49 Mo. 195. The evidence was properly admitted. Affirmed. Opinion by NORTON, J.— *Walker v. Linn County.*

DAMAGES—MOTION TO SET ASIDE JUDGMENT — AFFIDAVIT — ANSWER — SERVICE — APPEARANCE.—The Supreme Court will not interfere with the discretion of the trial court in refusing to set aside a judgment by default, where the proceedings have been regular, unless it be made to appear that such court acted arbitrarily or oppressively. Where the affidavit in support of such motion discloses negligence on the part of defendant and fails to show the facts constituting the defense, it does not appear that the circuit court abused its discretion. It is for the court, and not the affiant, to judge what facts constitute a good and meritorious defense, and the affidavit not setting them out is fatally defective. Lamb v. Nelson, 34 Mo. 501; Jacob v. McLean, 24 Mo. 40; Judah v. Hagan, 67 Mo. 252. The following has been held by this court to be no answer: "Defendant for answer to plaintiff's petition filed in the above entitled cause denies each and all the material allegations in said petition." Edmondson v. Philips, decided this term. When defendant ap-

pears and takes any step in defense of a cause without first objecting to the service, the insufficiency of it is thereby waived. Peters v. St. Louis, etc. R. Co., 54 Mo. 406; 52 Mo. 55. If the petition contains a cause of action imperfectly stated, it will be held good after verdict and judgment. Judgment will be reversed on the ground of excessive damages only when the verdict was the result of passion or prejudice, or when the damages are palpably excessive. Whalen v. St. Louis, etc. R. Co., 60 Mo. 323. Affirmed. Opinion by NORTON, J.—*Fry v. Hannibal, etc. R. Co.*

SUPREME JUDICIAL COURT OF MASSACHUSETTS.

January, 1881.

INSURANCE—FOREIGN COMPANY—STATUTE.—By accepting the permission given by the statutes of this Commonwealth to do business here, a foreign life insurance company becomes bound by the condition attached to the privilege, that all policies issued by it to residents of this Commonwealth should be subject to the provisions of St. 1861, ch. 186, known as the "non-forfeiture law;" and without reference to the question whether such policies were, in fact, made in this State or in another. Opinion by SOULE, J.—*Holmes v. Charter Oak Life Insurance Co.*

WRIT OF ENTRY—FRAUDULENT CONVEYANCE—LEVY.—At the trial of a writ of entry, it appeared that Y, in August, 1875, being then the owner of the demanded premises, and being insolvent, conveyed them to B without consideration, and for the purpose of preventing his creditors from attaching them, and to enable B to negotiate a loan upon them for the benefit of Y, from the proceeds of which Y might pay his debts. On December 3d, following, the demandant brought an action against Y, and while the record title stood in the name of B, made a general attachment of Y's real estate in the county wherein said premises were situated; but the officer did not make the addition to his return, required in Gen. Stats. ch. 123, § 55 (relating to the attachment of estates fraudulently conveyed). On the 6th day of said December, B, by direction of Y, conveyed the demanded premises to the tenant, to whom Y was at that time indebted in the sum of $1,000. The evidence, concerning the precise terms of the contract under which this last conveyance was made, was conflicting; but the jury found specially that Y, with intent to defraud his creditors, conveyed the premises to B, and caused B to convey them to the tenant, but that the tenant had no knowledge when he received his deed that Y made the conveyances, or caused them to be made with such intent. They also found that the consideration of the deed to the tenant was not to secure the tenant's debt, but to procure a loan of money to pay that debt, and Y to receive the balance, both of them intending it as security to the tenant. *Held*, that, as it was established by these findings, that the tenant acquired title to the premises for a valuable consideration, and in good faith, it cannot be defeated by levy of execution against Y, although he caused the conveyance to be made to defraud his creditors, and may have an equitable interest in any balance over $1000, which the tenant might receive from the estate by sale or otherwise; and if Y or the demandant has any remedy against the tenant to recover the balance received by him, above $1000, it must be in some other form of proceedings than by writ of entry. Snow v. Paine, 114 Mass. 520; Huickley v. Phelps, 2 Allen 77; Bancroft v. Curtis, 108 Mass. 47. Opinion by ENDICOTT, J.—*Morse v. Aldrich.*

CITY—LIABILITY FOR TORT.—Where a city was the owner of a building known as City Hall, used for the ordinary municipal purposes, which it had been accustomed to let for profit, for lectures, exhibitions, etc., having no relation to municipal affairs or interests; and at the time of the injury hereinafter mentioned, it had, acting by its committee on public property, let the hall and a smaller room adjoining, for profit, to the Southern Massachusetts Poultry Association, the sum paid including compensation for the lighting and heating of the rooms, and for the services of the janitor, who, by the appointment of the city, had the care of the building; and the plaintiff, passing into said smaller room, suffered injuries by falling through a trap door, negligently left open by the janitor, while doing acts in the lighting and heating of the rooms, it was *held*, that the city was liable. Opinion by MORTON, J.—*Worden v. New Bedford.*

CONTRACT — CONSIDERATION — STATUTE OF FRAUDS.—The plaintiffs, having liens on the defendant's schooner for the amount due them for materials furnished to a former owner of the schooner in her construction, refused to permit said schooner to go to sea unless the liens were paid. The defendant thereupon made an oral promise to pay one-third of the amount of their liens in cash, and the balance when he sold the vessel, which offer the plaintiffs accepted, and they permitted the vessel to go to sea, and did not prosecute their liens. The defendant paid a part of the amount of the liens, and afterwards sold the vessel. In an action for the unpaid balance, the defendant contended that it could not be maintained, because the original debtor was not released when his promise was made, and the liens had not been since discharged; so that the promise was within the statute of frauds, being a verbal promise to pay the debt of another. *Held*, that the defendant's promise was a new and independent contract, founded on a valid consideration. Opinion by SOULE, J.—*Fears v. Story.*

ASSIGNEE — PLEDGE — REDEMPTION. — The plaintiffs brought a bill in equity to redeem certain

shares of the capital stock of the Granite Mills, a corporation, which had been pledged to the defendant by one B, who afterward assigned all his estate, real and personal, to the plaintiffs as trustees, to convert it into money and distribute the net proceeds among his creditors. The defendant contended that it was entitled to hold the stock as collateral security, not only for the note with which it was pledged, but for the unpaid balance of other notes which it held against B. After the promissory words of the note, said B had written: "I having deposited with this obligation, as collateral security hereto, nine shares of the capital stock of the Granite Mills, with full authority to sell the same without notice, either at public or private sale, or otherwise, at the option of the holder or holders thereof, on the non-performance of this promise, he or they giving me credit for any balance of the net proceeds of such sale or sales, after deducting the expenses thereof, and paying all sums then due from me to said holder or holders, or to his or their order." *Held*, that the plaintiffs were entitled to redeem the stock on payment of the amount due on the note with which it was pledged, with interest, after deducting from that amount the dividends, if any, received by the defendant on the stock, with interest, and that the case must be referred to a master to state the account. Opinion by SOULE, J.—*Hathaway v. Fall River National Bank.*

QUERIES AND ANSWERS.

[*** The attention of subscribers is directed to this department, as a means of mutual benefit. Answers to queries will be thankfully received, and due credit given whenever requested. To save trouble for the reader each query will be repeated whenever an answer to it is printed. The queries must be brief; long statements of facts of particular cases must, for want of space, be invariably rejected. Anonymous communications are not requested.*]

QUERIES.

24. What is the remedy of the owner of a location of land before patent, that has been fraudulently or irregularly sold for taxes, in which the time for redemption has expired, under which sale the purchaser is in possession and derives the title of the locator, and holds him out, the legal title being in the United States? H. B.

Circleville, O.

25. Is sec. 3951 of the Revised Ssatutes mandatory? In other words, if A, in 1856, begins the use of B's land as a way of necessity, will he in twenty years gain a right of way by necessity? What effect has the statute on such use?. L. I.

Pleasant Hill, Cass Co., Mo.

QUERIES ANSWERED.

Que. 13. [12 Cent. L. J. 239.] In a sheriff's deed on the foreclosure of a mortgage by advertisement, the sheriff signs his name, but not officially. Does the want of the official character to the signature render the deed void? In the body of the deed he is described by his proper name as sheriff. In the proof of acknowledgment, the acknowledging officer certifies that he is personally known to be the person described in, and who executed the deed, and to be the sheriff, etc. And in the proof of sale he swears that he is and was at the date of sale, the sheriff, etc.; in fact, the deed appears in every way sufficient except that the official character of the sheriff does not appear to his signature to the deed. How does this affect the validity of the deed, if at all? X.

Answer. See Henderson v. Pitmann, 20 Ga. 735. "An attachment professed in the body thereof to have been issued by Benjamin Samuels, one of the justices of the peace for said county." It was signed by Benjamin Samuels, without the initials J. P." The court, Benning, J., delivering the opinion: "There is no law which says that the signature of a public officer shall be considered official only when it is followed by his official title, or by named letters standing for his title. * * * * Thus, then, it appears that each part of the attachment, except the signature, shows for itself that as to it, Samuels acted in his official, and not in his private, character. * * * * And it is a rule of law, that interpretation shall, if possible, be such as to make every part of the instrument have some effect, and especially be such as to prevent the instrument from being without effect."

J. J. ABRAMS.

Savannah, Ga.

RECENT LEGAL LITERATURE.

MISSOURI REPORTS. Reports of Cases Argued and Determined in the Supreme Court of the State of Missouri. Thomas K. Skinker, State Reporter. Vol. 71. Kansas City, 1881: Ramsey, Mitchell & Hudson.

This volume contains many interesting and novel adjudications. We can, however, only notice a few of them on account of our limited space. Porter v. Hannibal, etc. R. Co., p. 81. involved the question of whether "mental pain and anguish are proper elements of damages" in an action for personal injuries through negligence, no wantonness or malice being charged. The court, HENRY, J., takes issue with the statement of Mr. Greenleaf in his work on Evidence (§ 267) to that effect, supported by the citation of Flemington v. Smith, 2 Car. & Payne, 292; Blake v. Midland Ry. Co., 10 E. L. & Eq. 437, and Cumming v. Williamsburg, 1 Cush. 451, and proceeds to distinguish between cases brought by a parent or personal representative for the injury to his child or deceased, and those in which the action is in the name of and for the benefit of the injured party himself. Both Flemington v. Smith, and Blake v. Midland Ry. Co., belong to the former class of cases; and there it was held, (and as the court thinks, properly,) that the matter of mental suffering could not be an element of damage. In the latter case, which was an action

by a widow in which she sought to recover damages for the mental suffering occasioned by the loss of her husband, Coleridge, J., said: "The legislature would not have thrown upon the jury such great difficulty in calculating the *solatium* to the different members of the family without some rule for their guidance. When an action is brought by an individual for a personal wrong, the jury in assessing damages can, with little difficulty, award him a *solatium* for his mental suffering, along with an indemnity for his pecuniary loss." And Cummings v. Williams, burg is shown to promulgate doctrine ,diametrically opposed to that which it is cited to sustain by Mr. Greenleaf. The vexed question of the effect of a stipulation in a promissorynote for the payment of collection fees was passed upon in First National Bank v. Gay, p. 627. The court follows the doctrine laid down by it in the previous decisions of First National Bank v. Gay, 63 Mo. 33, and that of Samstag v. Conley, 64 Mo. 476, and that of the Supreme Court of Pennsylvania in Woods v. North, 84 Pa. St. 407, and hold that such a stipulation destroys the negotiability of the instrument, and consequently, that a transferrer is to be treated, not as an indorser, but as an assignor; that he is not jointly liable with the maker, and that no joint action can be maintained against them.

LAW RELATING TO STOCKS, BONDS AND OTHER SECURITIES, IN THE UNITED STATES. By Francis A. Lewis, Jr., of the Philadelphia Bar. Philadelphia, 1881: Rees, Welch & Co.

This is one of that class of books, become quite common of late, in which it is sought to teach the persons engaged in a particular trade or business, the law applicable to their transactions. Of course, this can only be done to a limited extent. When it is attempted to do more than give to individuals, not versed in the general principles of jurisprudence, and not impregnated with its methods of thought and reasoning, more than an outline of the rules applicable to the law of any particular trade or business, the result must necessarily be a failure, as every lawyer will readily realize. In the book in question this seems to have directed and controlled the author's labors. While there is no effort to make an exhaustive statement of the principles of the law of contracts, there is an adequate and plain statement of such doctrines, applicable to the dealings in public securities, as may be readily understood, by any intelligent person, accustomed to such transactions, though he may not have had the advantage of a legal training. As to the value and accuracy of those portions of the work in which the author gives an account of the rise and development of stock-exchanges, and describes the methods and technology of dealings in such securities, we cannot speak authoritatively. We can say, however, that we found them absorbingly interesting.

AMERICAN DECISIONS, Containing Cases of General Value and Authority, Decided in the Courts of the Several States from the earliest Issue of the State Reports to the Year 1869. Compiled and Annotated by A. C. Freeman. San Francisco, 1881: A. L. Bancroft & Co. Vols. 22, 23 and 24.

We have heretofore so expressed our opinion of this excellent series of selected reports, that it is unnecessary for us to print any extended editorial opinion of these volumes, beyond the statement that we see no cause in them to repent or retract anything that we have said. The plan was originally a good one, and the work so far has been done in such a way as to reflect credit upon both publisher and editor.

CORRESPONDENCE.

ANSWER TO QUERY 12.—LIMITATIONS—POSSESSION.

To the Editor of the Central Law Journal:

The answer contained in 12 Cent. L. J. 264, to query 12, in 12 Cent. L. J. 216, is not exactly in point. The writer does not fully comprehend the question. In the case supposed the land is unoccupied. Says Mr. Washburn: "Seisin is either in law or in fact. Seisin in fact, necessarily implies possession, 'there being no legal difference between the word seisin and possession.' For a seisin in law there must be a right to immediate possession according to the nature of the interest, whether corporeal or incorporeal." 1 Washb. Real Prop., 34, 35. We take it that the owner of the legal title is, as a general proposition, entitled to the possession, as against the owner of an equity. Or, in the language of the Supreme Court of Pennsylvania, "the legal title to wild land draws to it the possession, unless it has been interrupted by an actual entry and adverse possession by another." Young v. Hardie, 55 Pa. St. 172. "Two persons can not be in the adverse constructive possession of the same land at the same time." Hodges v. Eddy, 38 Vt. 344, 345. Consequently, in the case supposed, the plaintiff was neither seized in law nor in fact, within ten years before the commencement of the action. The equity under which plaintiff claims title may have been a resulting trust, for example, which occurred twenty, thirty, or any number of years previous. "Where there is a statute bar at law, the same period, in analogy, or obedience to the statute, is adopted in equity as a bar to equitable claims." Perry on Trusts, § 855, and cases cited. At law, the statute does not commence to run until there is an actual adverse possession, at which time the cause of action accrues. But in equity, the fact of adverse possession does not create the cause of action; and we see no reason why the running of the statute should date from that time. Why not from the time the right of action accrued? Yet the generally accepted theory undoubtedly is

that the statute is no bar, unless there has been an actual adverse possession for the full period of limitation. The writer, being unable to find any case in which the above question has been raised, takes this method of endeavoring to draw out some expressions of opinion from members of the profession. M.

REMOVAL OF CAUSES—COUNTERCLAIM.

Editor Central Law Journal:

There is an argument in favor of the decision of the United States Supreme Court in Dennick v. Central R. Co., of New Jersey, 12 Cent. L. J. 393, which seems conclusive.

In Jeffersonville R. Co. v. Swayne's Admr. 26 Ind. 477, the court held that a claim for damages for causing the death of a party under the statute was not assets of the deceased, but went to the widow and children or next of kin of the deceased. Where the death of a non-resident who had no assets in the State, occurred in the State by a wrongful act, the court held letters of administration could not issue in Indiana. If the law were that no action would lie against the wrong-doer, unless it were brought by an administrator appointed in the State where the injury causing death occurred, there would be no remedy for the next of kin of non-residents, who had met their death in Indiana. As the courts in such cases have no jurisdiction to appoint an administrator, there would be no person to sue. It follows—as there is no wrong without a remedy—that the administrator appointed by the jurisdiction, where the deceased lived and had assets, may sue in any State where he can obtain jurisdiction of the defendant, but he must, of course, rely on the statute of the State where the injury occurred. The Supreme Court of Indiana, after having sustained the petition of the defendant in the case in 26 Ind., cited to revoke the letters of administration, affirmed a judgment rendered against the defendant in an action brought by the foreign administrator for the same cause. C. DENBY.

Evansville, Ind., April 29, 1881.

NOTES.

——The *New York Daily Register*, in discussing the functions of a lawyer, recently, makes these apt remarks: "One of the disadvantages of our abandonment of the English division of the profession into attorneys, solicitors, barristers, etc.. is, that the great diversity of view and usage among lawyers, as to what is within the scope of their function, finds no external expression to the client. Here is a lawyer who is by nature and habit merely an attorney. He does not like conveyancing; he dislikes the care of investments; but he scents an action afar off. If he is consulted by the trustee of an estate which has drifted into confusion, he advises on any action that ought to be brought, but he thinks it is none of his business to consider what ought to be done to secure the assets, retrieve losses and improve the condition of the fund. His client, perhaps, has no distinct idea of what he wants to be advised about. To him the whole estate may be a muddle, a source of vague and undefined solicitude, without any discrimination as to the nature of the embarrassments and the different remedies. If he happens to consult such an one as we have mentioned, and the case does not require an action or an accounting, he will very likely get no light. If he happens to consult one whose views and usages are those of a solicitor, he may get a very different kind of assistance. Such an adviser may not think it beyond his function to look over the whole situation in detail, to suggest that this property ought to bring more rent; that that bank balance is too large to be lying where it draws no interest; that the expenses of insurance may safely be reduced; that this account ought to be settled, and that loan ought to be called in, and such and such assets converted into money. Illustrations might be multiplied indefinitely. Whether it is proper to make such suggestions depends on the circumstances of the inquiry; but many clients in asking advice are not very clear themselves what they want. There is a time in life after which a practitioner does not adapt himself much to the work which offers. He does that which is in his line to do, and the rest gets passed over. But few points are more important to young practitioners who are looking forward to a general practice, than to have a right appreciation of the various functions in which clients may be served within professional limits, and an intelligent readiness in entering on such service when desired, and aptitude in the diverse functions which in our practice are united without nominal discrimination."

——One of Matt Carpenter's stories about Choate is to the following effect: Carpenter studied law with Rufus Choate, and got his first start from that great advocate. He was fond of telling this characteristic anecdote of Choate. He went to Choate at his house on some business of the office, and found him alone in his library in the second story. He lay on a lounge chatting freely of everything but the matter his student had come about, and managed to put that by whenever it was approached. At length he said: "Open that sideboard, my boy, and take out the decanter and glasses you find there, and we'll comfort ourselves with a drink." But no sooner had Carpenter obeyed these directions than a footstep was heard on the stairway, furtive, timid, but steadily approaching. Choate listened an instant, with a merry glitter in his eye, and then cried: "Hustle them! Hustle them in! Methinks it hath a presbyterian sound." But the intruder turned out to be an Episcopalian clergyman; the decanter reappeared, and Carpenter left without being able even to mention the business upon which he had gone.